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WILLS AND TRUSTS

Lynne McNiel Candler*

THIS Article reviews legislative and case law developments in the areas of wills, nontestamentary transfers, heirship, estate administration, guardianships, and trusts. The Survey period covers decisions published between November 1, 1990, and October 31, 1991, as well as changes to the Probate Code, the Property Code, and other codes and statutes enacted by the Seventy-Second Texas Legislature that impact on the areas of estate planning and probate.

I. WILLS

A. Will Construction

The Texas supreme court, in *McGill v. Johnson*,¹ held that language in a will that provided a gift to the testator's sisters following the death of the testator's son, if the son died without a natural child born in wedlock, created a vested remainder subject to a condition subsequent.² In contrast, the court of appeals had held that the language created a contingent remainder.³ The supreme court interpreted the language in such a manner that the sisters' remainder interest vested at the earliest possible date, with only their right to possession and enjoyment deferred until the son's death.⁴ The supreme court also held that the open mine doctrine applied to the oil and gas leases, both in the trust and in the son's life estate following termination of the trust.⁵ The testator executed numerous mineral leases, which became

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1. 799 S.W.2d 673 (Tex. 1990).

2. *Id.* at 675, 677. The will provided that the son would receive the real property held in the trust when he reached age forty if he had married and had a child born in wedlock by that time; if he had not married and had a child born in wedlock, the son would receive a life estate in the real property with a remainder to the testator's two sisters. If the son married and had a child born to the marriage after he attained age forty, the son would receive the real property outright.

3. 775 S.W.2d 826, 831 (Tex. App.—Austin 1989). For a discussion of the opinion of the court of appeals, see Lynne McNiel Candler, *Wills and Trusts, Annual Survey of Texas Law*, 44 Sw. L.J. 301, 304 (1990).

4. 799 S.W.2d at 675. The court found that the language failed to manifest the testator's intent that the remainder not vest until the son's death and, absent the testator's express intent, Texas courts should construe a remainder interest as vested rather than contingent if possible. *Id.* The court also found that the remainder interest at issue in this case was a vested remainder subject to divestment because the condition that the son receive the real property outright if he married and had a natural child after he reached age forty came after the creation of the remainder interest in the will. *Id.*, citing *Pickering v. Miles*, 477 S.W.2d 267, 270 (Tex. 1972).

5. 799 S.W.2d at 677. The court affirmed this portion of the court of appeals decision. See 775 S.W.2d at 833. The open mine doctrine provides that a life tenant may receive all

part of the trust estate following his death. Under the terms of the will, the trustee specifically had the power to execute new mineral leases. The supreme court concluded that the testamentary trust for the son's benefit did not preclude application of the open mine doctrine and that the son should receive all proceeds from the leases during his lifetime.⁶

In *Jacobs v. Sellers*⁷ the Beaumont court of appeals examined a decedent's will in order to classify the bequests under the will for purposes of apportioning debts, administration expenses, and taxes. The testator made several specific gifts of personal property under the terms of sections (a) through (e) of paragraph IV of her will. The testator provided in paragraph VIII of her will that after distribution of the specific legacies contained in paragraph IV she wished for the remainder of her estate to be "operated as an entity . . . until such time as the payment of all taxes and debts . . . and that no distribution be made hereunder until such time as this has been accomplished."⁸ The appeals court concurred with the trial court's finding that the decedent intended for all of her estate, except for the specific legacies contained in sections (a) through (e) of paragraph IV, to bear proportionate shares of debts, administration expenses, and estate and inheritance taxes.⁹

In *Hudson v. Hopkins*¹⁰ the Tyler court of appeals construed a gift of the residue made to two individuals and the estate of Dr. Sam H. Brock, Sr., holding that the gift to Dr. Brock's estate was a valid gift.¹¹ A controversy arose between the executor of the testator's estate and the beneficiaries of Dr. Brock's estate. The executor thought that the will meant that the residue would be divided into three equal shares, with two shares passing to the individual beneficiaries and the third share passing to Dr. Brock's estate, in turn to be divided among its beneficiaries. The beneficiaries of Dr. Brock's estate argued that the will evidenced the testator's intent to divide his residue into four equal shares, with one equal share passing to the two individuals named in the will and the other two equal shares passing to the two beneficiaries of Dr. Brock's estate. The trial court granted summary judgment in favor of the executor, and the beneficiaries of Dr. Brock's estate appealed. The court of appeals found that the will, in making a gift of one-third of the residue to Dr. Brock's estate, was not ambiguous as a matter of law.¹²

income from mineral interests, including bonuses and royalties, if the lease were in effect at the time of the creation of the life estate. If the open mine doctrine did not apply, the life tenant could receive the income from the leases only, with all bonuses added to the remainder estate.

6. 799 S.W.2d at 677.

7. 798 S.W.2d 24 (Tex. App.—Beaumont 1990, writ granted).

8. *Id.* at 27.

9. *Id.* at 28-29.

10. 799 S.W.2d 783 (Tex. App.—Tyler 1990, no writ).

11. *Id.* at 787. The will provided a gift of the residue to the two individuals and the estate "to be divided equally between the beneficiaries in fee simple." *Id.* at 784.

12. *Id.* at 786. The court noted that the testator chose the estate as the beneficiary rather than the two beneficiaries of the estate, that the testator intended to treat the estate as a single beneficiary to receive one-third of the residue, and that the use of the term "estate" in a common manner rather than in a technical manner indicated the testator's intent to treat the gift to the beneficiaries of the estate as a joint gift rather than making individual gifts to those benefi-

In *Nail v. Thompson*¹³ the Fort Worth court of appeals construed the terms of a will and determined that the testator's adopted family members could not be remainder beneficiaries of the testamentary trust.¹⁴ The testator provided for distribution of the trust assets to the "lawful heirs . . . born of the body"¹⁵ of the trust beneficiaries. The appeals court held that the trial court correctly examined state law at the time the testator made her will to determine the meaning of the testator's language.¹⁶ The appeals court found that since the will did not include ambiguous language, the trial court could properly grant summary judgment.¹⁷ The appeals court also held that the trustees did not owe the adopted descendants of the trust beneficiaries a fiduciary duty because those persons were not beneficiaries of the trust.¹⁸ The dissent argued that the language of the will created an ambiguity as to whether the testator intended for the provision relating to children born to the beneficiaries should also extend to later generations.¹⁹

In *West Texas Rehabilitation Center v. Allen*²⁰ the Austin court of appeals determined that, under the terms of the will, the executor improperly distributed funds to West Texas Rehabilitation Center.²¹ The will provided for a specific cash bequest of \$10,000 to West Texas Rehabilitation Center, as well as an additional \$20,000 in cash bequests to other named beneficiaries. The will then provided that if the testator had more money available for distribution than the \$30,000 total of the cash bequests, the executor should distribute all of the additional funds to West Texas Rehabilitation Center. The estate had almost \$58,000 in cash, as well as approximately \$133,950 in priced investments in a Merrill Lynch account. The executor determined that the entire value of the Merrill Lynch account, including the priced investments, should be distributed to West Texas Rehabilitation Center. The other beneficiaries of the estate filed suit against the executor alleging that only the cash and the cash management account funds in the Merrill Lynch account should be available for distribution to West Texas Rehabilitation Center. The trial court agreed with these beneficiaries and found that the executor distributed almost \$121,000 in excess of what he should have distributed to West Texas Rehabilitation Center. The appeals

ciaries. *Id.* The court also examined the opinion in *Haile v. Holtzclaw*, 414 S.W.2d 916, 927 (Tex. 1967), which held that a deed could validly convey real property to an estate, and determined that a will may also convey property to an estate. 799 S.W.2d at 786-87. As a result, the gift to the estate indicated the testator's desire that the gift should pass to the beneficiaries of the estate under the terms of Dr. Brock's will. *Id.*

13. 806 S.W.2d 599 (Tex. App.—Fort Worth 1991, no writ).

14. *Id.* at 600, 601.

15. *See id.* at 600.

16. *Id.* The court determined that the testator clearly intended to exclude adopted descendants of the trust beneficiaries from receiving distribution of trust assets upon termination of the trust because of the language the testator used in defining the remainder beneficiaries. *Id.* at 601.

17. *Id.* The court stated that the testator could have included adopted remainder beneficiaries by clearly stating her intention to do so in the will. *Id.*

18. *Id.* at 602.

19. *Id.* at 603 (Meyers, J., dissenting).

20. 810 S.W.2d 870 (Tex. App.—Austin 1991, no writ).

21. *Id.* at 871, 874.

court held that the testator clearly used the words "money" and "funds" interchangeably to mean that only cash should pass to West Texas Rehabilitation Center and that all other property, including stocks, bonds, and mutual funds held as investments in the Merrill Lynch account, should pass under the residue.²²

In *Floyd v. Floyd*²³ the El Paso court of appeals held that the testator's specific identification of his children in his will controlled over a general definition of children also contained in the will.²⁴ The testator married a woman who had a son from a previous marriage, and the couple later had a child born to their marriage. The testator always treated his stepson as his own child, and, although the testator never adopted the stepson, he served as the stepson's guardian for a while and apparently had intended to adopt his stepson. The testator named both his stepson and his natural son as his children in his will, and he named both sons to serve as co-executors and co-trustees under his will. He provided for his children to share equally in the residue of his estate. The appeals court determined that the testator clearly intended to treat his stepson as his own son for all purposes of the will, which the testator repeatedly demonstrated by referring to both sons and by treating the stepson equally with the natural son and with the testator's wife.²⁵

B. Will Contests

In *Broach v. Bradley*²⁶ the Eastland court of appeals found that sufficient evidence existed to support the jury's finding concerning the testator's testamentary capacity, and that the jury's failure to find that someone exerted undue influence over the testator was not against the preponderance of the evidence.²⁷ The testator, although elderly, was a woman of firm resolve, of sound mind, who understood her business affairs at the time she signed her will. A friend of the testator, who was a beneficiary under her will, drove the testator to the lawyer's office and was present when the testator signed her will, but no evidence existed that the friend exerted undue influence over the testator. The appeals court found that this evidence was sufficient to demonstrate that the testator had the requisite capacity for executing a will and that the friend did not exert undue influence over the testator.²⁸ The appeals court also found that the trial court did not err in allowing one of the witnesses to the will to testify at trial.²⁹ During the trial the will proponent

22. *Id.* at 874. The court also held that the trial court did not abuse its discretion in awarding attorney's fees to the other beneficiaries. *Id.*

23. 813 S.W.2d 758 (Tex. App.—El Paso 1991, writ requested).

24. *Id.* at 762.

25. *Id.* at 761. The court determined that the specific reference to the stepson as being the testator's son expressed the testator's intention, and this expression controlled over a general definition of the term "children," which would provide identification for a class of beneficiaries not otherwise defined in the will. *Id.* at 761-62.

26. 800 S.W.2d 677 (Tex. App.—Eastland 1990, writ denied).

27. *Id.* at 681.

28. *Id.*

29. *Id.* at 679.

called the notary who had executed the self-proving affidavit as a witness to the testator's capacity. The contestant, after hearing the notary's evidence concerning the execution of the self-proving affidavit, first raised the issue that the self-proving affidavit was invalid because the notary did not properly take the witnesses' oaths. The proponent then called one of the witnesses to the will in order to prove that the testator executed her will with all requisite formalities and with full capacity. The contestant objected because the proponent had not designated the witness prior to trial. The trial court overruled the contestant's objection and the appeals court affirmed.³⁰

In *Holcomb v. Holcomb*³¹ the Dallas court of appeals found that the contestant did not accept assets from the estate under the terms of the will admitted to probate greater than those to which she would have otherwise been entitled³² and that the proponent exerted undue influence over the testator.³³ The proponent and contestant, brother and sister, both initially offered their father's last will to probate. The daughter later contested the last will and an earlier will and offered for probate a will executed prior to the last two wills. The decedent, while in the hospital, executed a will on December 1, 1983, in which he left the bulk of his estate to his daughter. The decedent and his ex-wife had divorced in 1969, and had evenly divided their sizable estate between them at that time. The mother and her son remained very close, but the mother had strained relations with her daughter, who remained close to her father. The testator desired to see the estate split equally between his children and felt that his ex-wife would favor their son, possibly to the exclusion of their daughter. The testator, therefore, determined to leave the majority of his estate to his daughter. Soon after his release from the hospital the decedent executed a new will, dated December 19, 1983, in which he left his estate equally to his two children, with the exception of five rent houses that he had previously transferred to his daughter. The decedent executed a third will on February 1, 1984, in which he left all of his estate equally to his two children, with the five rent houses to be included in the value of his daughter's half. The testator died less than a month after he executed the final will. The daughter alleged that her father executed both of the last two wills as the result of her brother's undue influence. The daughter specifically alleged that her brother told their father that he would not receive many assets from his mother and that he would make things equal with his sister after both their parents died. The jury found that the testator executed both

30. *Id.* The appeals court noted that the issue of the validity of the self-proving affidavit did not exist prior to the trial and that the proponent would have to call one of the witnesses to the execution of the will in order to prove that the testator properly executed her will. *Id.* The court also denied the contestant's claim that the testator and witnesses did not execute the will with the proper formalities. *Id.* at 680. The proponent's evidence showed that the testator executed the will in the presence of two witnesses over the age of fourteen and that the testator was over the age of eighteen years and of sound mind when she signed the will. The court held that in order to be properly executed a will does not have to meet all of the additional requirements for a self-proving affidavit under TEX. PROB. CODE ANN. § 59(a) (Vernon Supp. 1992). 800 S.W.2d at 680.

31. 803 S.W.2d 411 (Tex. App.—Dallas 1991, writ denied).

32. *Id.* at 414.

33. *Id.* at 415.

of the last two wills because of undue influence or mistake and that the father and son had a confidential relationship. The trial court set aside the probate of the February 1, 1984, will and admitted the December 1, 1983, will to probate. The son appealed and asserted that his sister could not contest the validity of the February 1 will because she had accepted benefits under the will. The appeals court found that the son did not establish as a matter of law that the daughter received more benefits under the probated will than she would have received under intestacy.³⁴ The appeals court then found that the jury had sufficient evidence before it to conclude that the testator was under no undue influence when he executed the December 1, 1983, will.³⁵ Finally, the appeals court found the last two wills invalid because the testator executed them under undue influence.³⁶

In *Turk v. Robles*³⁷ the Houston court of appeals found that although the trial court incorrectly placed the burden of proof in the jury charge,³⁸ the error was harmless.³⁹ The beneficiary of the testator's will, who was not a relative, but who lived with the testator for many years and took care of her, offered the testator's will for probate. The testator's nephews contested the probate of the will and offered a later document that purported to revoke the will offered for probate. Not long before the testator executed the later document, one of her nephews moved the testator from her home to the county in which the nephew resided. Shortly before her death and after her arrival in the nephew's county of residence, the testator, who, according to an application for guardianship that the nephew filed, was not of sound mind, executed a document that purported to be a new will and purported to revoke all prior wills. At trial, the nephews contended that the beneficiary of the earlier will had exerted undue influence over the testator to make her sign the will and that the testator had later revoked the will. The jury found that the beneficiary of the earlier will had not exerted undue influence over the testator and that the testator did not have testamentary capacity to execute the later document, nor did she execute the later document with all requisite formalities. The nephews appealed, contending that the trial court erroneously placed the burden of proof on them to demonstrate that the testator

34. *Id.* at 414. The court stated that in order to prove an affirmative defense of estoppel based upon his sister receiving benefits under the will, the son must prove that she received more under the probated will than she otherwise would have received, which he did not prove. *Id.*

35. *Id.* The court noted that the testator specified those persons whom he wished to serve as witnesses and that his attending physician not only served as a witness to the will, but also performed a medical test prior to the execution to determine the testator's mental capacity. *Id.*

36. *Id.* at 415. The jury found that the testator relied on his son's representations that the mother did not convey as much property to their son as the testator thought that she would. The court noted as follows:

[A] mistake of fact or law alone will not defeat the probate of a will even though the testator would have made a different will but for the mistake inducing the making of the will. Coupled with undue influence or fraud perpetrated upon the testator, such a mistake is sufficient to deny probate of such an instrument.

Id.

37. 810 S.W.2d 755 (Tex. App.—Houston [1st Dist.] 1991, writ denied).

38. *Id.* at 759.

39. *Id.* at 759-60.

revoked the earlier will and that she had testamentary capacity to do so. The appeals court found that the nephews met their burden of providing some evidence casting doubt on the continued effect of the earlier will by giving oral testimony that the decedent revoked the earlier will.⁴⁰ The burden then shifted to the will proponent to prove that the testator did not revoke the will.⁴¹ The trial court worded two of the questions so that the nephews improperly had the burden of proof. The appeals court determined, however, that the error was harmless because the jury found that the testator did not have capacity to execute the document that purported to revoke the earlier will.⁴²

In *Estate of Kidd*⁴³ the Amarillo court of appeals examined the issue of discovery sanctions in the context of a will contest. A daughter filed a motion to have her father removed as independent executor of her grandmother's estate under Probate Code section 149C(a)⁴⁴ because her father failed to file an inventory. The daughter later filed a will contest in which she alleged that her grandmother executed the probated will as the result of fraud and undue influence and that her grandmother did not have testamentary capacity. The father filed a motion for summary judgment as a counterclaim and sought recovery of attorney's fees. The daughter filed a motion to compel her father to produce documents during discovery. The trial court granted the daughter's motion and assessed attorney's fees against the father. Both the court of appeals and the supreme court rejected the father's attempts to file a petition for writ of mandamus in connection with the trial court's assessment of attorney's fees against him. The father finally produced the first page of the documents that the daughter sought to discover, and she moved for additional sanctions.⁴⁵ The trial court awarded the daughter additional attorney's fees. The daughter eventually filed a motion for nonsuit in the will contest, which the trial court granted. The daughter later filed a motion for dismissal of her father's counterclaim because it involved the same issues as the will contest. The trial court granted the daughter's motion, dismissed the counterclaim, denied the father's request for attorney's fees, and rendered judgment awarding the daughter attorney's fees based on the father's discovery abuse. The appeals court first determined that the trial court properly awarded attorney's fees to the daughter

40. *Id.* at 758.

41. *See id.* at 759. The court stated that the trial court must word the jury charge "so that an affirmative answer indicates that the party with the burden of persuasion on that fact established the fact by a preponderance of the evidence." *Id.*

42. *Id.* at 760. The court also found that the trial court did not err by refusing to submit an instruction on fiduciary duty as part of the instruction on undue influence. *Id.* The court noted that the trial court followed the holding in *Rothermel v. Duncan*, 369 S.W.2d 917, 922 (Tex. 1963), in drafting the jury question and that fiduciary duty is not part of the holding in *Rothermel*. 810 S.W.2d at 760. The court cited *Spillman v. Estate of Spillman*, 587 S.W.2d 170, 172 (Tex. Civ. App.—Dallas 1979, writ ref'd n.r.e.) for the proposition that the submission of an undue influence issue encompasses the presumption raised by evidence that a fiduciary relationship existed between the alleged influencer and the testator. 810 S.W.2d at 760.

43. 812 S.W.2d 356 (Tex. App.—Amarillo 1991, no writ).

44. TEX. PROB. CODE ANN. § 149C(a) (Vernon Supp. 1992).

45. The daughter moved for sanctions under TEX. R. CIV. P. 215.

because the trial court most likely took judicial notice of the reasonableness of the attorney's fees and because the father had proper notice and the opportunity for a hearing on the award of attorney's fees.⁴⁶ The appeals court next found that the trial court properly dismissed the father's counterclaim because the only new issue in the counterclaim was the father's request for attorney's fees, which was not a claim for affirmative relief.⁴⁷ Finally, the appeals court determined that the trial court did not err in refusing to award the father his attorney's fees.⁴⁸

In *Frink v. Blackstock*⁴⁹ a Houston court of appeals overruled the relator's motion for leave to file petition for writ of mandamus arising out of a will contest.⁵⁰ The relator, an elderly Kansas resident, was the contestant in the will contest. During a hearing at which the relator appeared only through his counsel, the trial court announced an order that the relator should appear at all subsequent hearings on the contested matters. The relator then filed his motion for leave to file a petition for writ of mandamus. The relator failed to attach a certified copy of the written order of the court or of any other pleading in the case. The relator also failed to file a brief with the court of appeals, apparently because the relator could find no authority to support his position. Finally, the relator failed to state any facts explaining how the trial court came to issue the order requiring the relator to appear for hearings on contested matters. Based upon the record, the appeals court determined that it could not find that the trial court had abused its discretion.⁵¹ The dissent, however, would have granted the relator's motion for leave to file petition for writ of mandamus.⁵²

C. Ademption

In *Morgan v. Morgan (In re Estate of Crawford)*⁵³ the Amarillo court of appeals found that the trial court correctly directed a verdict that no ademption of a specific legacy of stock occurred prior to the testator's death.⁵⁴ The decedent gave one of her two sons a power of attorney some four years prior

46. 812 S.W.2d at 359.

47. *Id.* TEX. R. CIV. P. 162 provides that a plaintiff may take a nonsuit if the plaintiff timely files the motion for nonsuit and if the defendant has no counterclaim for affirmative relief.

48. 812 S.W.2d at 360. The court noted that the trial court rendered judgment solely on the issue of discovery sanctions after dismissing the counterclaim. *Id.* Accordingly, the trial court had no action before it on which to base an award of attorney's fees. The appeals court stated, however, that even if the trial court could have awarded attorney's fees, it would not have abused its discretion in refusing to do so. *Id.*

49. 813 S.W.2d 602 (Tex. App.—Houston [1st Dist.] 1991, no writ).

50. *Id.* at 604.

51. *Id.* The court found that the relator had not demonstrated that the trial court's oral statement constituted an enforceable order and that the trial court could not hold the relator in contempt for failure to follow its order unless the court had entered a written order. *Id.*

52. *Id.* at 604-05 (O'Connor, J., dissenting). The dissent noted that the majority would be correct in denying the writ of mandamus based on the record that the relator presented, but noted that the relator had merely filed a motion for leave to file the writ of mandamus. *Id.* at 605.

53. 795 S.W.2d 835 (Tex. App.—Amarillo 1990, no writ).

54. *Id.* at 840.

to her death, but she continued to manage her financial affairs. Approximately two months prior to her death, the decedent made a new will in which she left the son to whom she had previously given the power of attorney all of her cash and certificates of deposit and left her other son all of her shares of stock. Approximately two weeks prior to her death, the decedent entered the hospital and the son to whom she had given the power of attorney contacted a stock broker concerning the sale of some of the decedent's stock. The son and the decedent set up a joint account at the brokerage house, and the son proceeded to order the sale of the stock. The decedent died prior to the settlement date for the sale. The son who ordered the stock sold pursuant to the power of attorney endorsed the check from the sale of the stock in his capacity as executor, although the court had not yet appointed him executor, and deposited the proceeds from the sale into his personal account. He later listed the stock on the inventory of estate assets, but he refused to pay the proceeds from the sale to his brother because he claimed the gift of stock was adeemed. The brother sued to recover the proceeds from the sale of the stock. The trial court determined that the stock was part of the decedent's estate at the time of her death and directed a verdict. The other brother appealed, contending that ownership of the stock passed to the purchaser on the date of sale. The appeals court analyzed the UCC provisions relating to the transfer of stock⁵⁵ and determined that no redemption occurred because the transfer was incomplete at the time of the decedent's death.⁵⁶

D. Disclaimer

In *Dyer v. Eckols*⁵⁷ a Houston court of appeals held that, unless a statutory provision exists to the contrary, a disclaimer is not a fraudulent trans-

55. TEX. BUS. & COM. CODE ANN. § 8.313(a) (Vernon 1991) (incorporates UCC § 8.313(a)).

56. 795 S.W.2d at 838-40. The decedent held certificates of the stock, so the court determined that TEX. BUS. & COM. CODE ANN. § 8.313(a)(2) and (6) did not apply since they deal only with stock not represented by certificates. 795 S.W.2d at 839. The court then concluded that subsections (8), (9), and (10) did not apply because these subsections deal with the transfer of investment securities that serve as collateral for an obligation of the owner. *Id.* Because the purchaser did not obtain possession of the stock certificates prior to the decedent's death, the court found that subsection (1) did not apply. *Id.* at 839-40. Neither the decedent nor her attorney in fact had actually indorsed the certificates over to the purchaser, so the court found that subsection (3) did not apply. *Id.* at 840. The financial intermediary had not identified the stock in any of its books or records as belonging to the purchaser, so subsection (4) did not apply, and the certificates were in the possession of a financial intermediary, not a third party, so subsection (5) did not apply since a third party did not hold the securities for the purchaser. *Id.* Finally, no evidence existed that a clearing corporation had any involvement with the transaction, thus a clearing corporation did not have any entries of the transaction on its books, which would have made subsection (7) applicable. *Id.* The court accordingly found that no transfer of the stock occurred prior to the decedent's death. *Id.* The court also found that although the plaintiff brother raised the issues of exemplary damages and the imposition of a constructive trust at trial, he did not preserve these issues for appeal because he made no claim either to the trial court or in a point or cross-point of error that the directed verdict deprived him of recovery on those issues. *Id.* at 841.

57. 808 S.W.2d 531 (Tex. App.—Houston [14th Dist.] 1991, writ dism'd by agreement).

fer.⁵⁸ The disclaimant was involved in an automobile accident that resulted in the death of another woman some four months prior to the death of the disclaimant's uncle. Three weeks after the uncle's death, the probate court admitted his will to probate. Under the terms of the will, the uncle left the disclaimant one-tenth of his residuary estate, which had a value of approximately \$200,000. The disclaimant later executed and delivered a disclaimer pursuant to Probate Code section 37A.⁵⁹ Soon after she executed the disclaimer, the disclaimant received service of citation in the damage suit resulting from the automobile accident. The plaintiff alleged that the disclaimant executed the disclaimer as a fraudulent transfer. The trial court found that as a matter of law a disclaimer can defeat the claims of the beneficiary's creditors and that a disclaimer is not a fraudulent transfer under the provisions of the Texas Uniform Fraudulent Transfer Act.⁶⁰ The appeals court found that a disclaimer relates back to and is effective as of the date of the decedent's death.⁶¹ The court stated that a disclaimant never possessed the property disclaimed and thus inferred that a fraudulent transfer of the disclaimed property could not occur.⁶² Because the Texas Uniform Fraudulent Transfer Act⁶³ does not mention disclaimers, a disclaimer is not a transfer under the act.⁶⁴

E. Revocation

In *Dean v. Garcia*⁶⁵ the Austin court of appeals determined that a testator had revoked a codicil by writing cancellation language on the codicil.⁶⁶ The testator executed his will and a codicil on the same day. Some months later, the testator decided to revoke the codicil and discussed the revocation with his attorney. The attorney advised the testator to indicate his intent to revoke the codicil by writing cancellation language on the codicil in his own handwriting. The testator did so and mailed the codicil to the attorney.⁶⁷ The testator died a short time later and the executor filed an application for probate of the will. The beneficiary under the codicil then filed an application for probate of the codicil, and the executor answered, alleging that the testator revoked the codicil. The trial court admitted the codicil to probate because it found that the language the testator wrote on the codicil did not revoke or cancel the codicil. The appeals court disagreed with the trial court and found as a matter of law that the cancellation language was sufficient to

58. *Id.* at 535.

59. TEX. PROB. CODE ANN. § 37A (Vernon Supp. 1992).

60. TEX. BUS. & COM. CODE ANN. § 24.005(a)(1) (Vernon 1987).

61. 808 S.W.2d at 533.

62. *Id.* at 534.

63. TEX. BUS. & COM. CODE ANN. §§ 24.002(12) (defines "transfer") and 24.005(a)(1) (Vernon 1987).

64. 808 S.W.2d at 535.

65. 795 S.W.2d 763 (Tex. App.—Austin 1989, writ denied).

66. *Id.* at 765.

67. The testator wrote the words "CANCELED" [sic] and "VOID" across the dispositive provision of the codicil, followed by the date and his signature. The testator added language expressing his intent to cancel the codicil at the bottom of the codicil and again signed and dated the document. *See id.* at 764.

cancel the codicil.⁶⁸ The appeals court also found that the revocation of the codicil did not result in the revocation of the underlying will.⁶⁹

II. NONTESTAMENTARY TRANSFERS

Two cases address the issue of whether a joint bank account was held with rights of survivorship.⁷⁰ In *Stauffer v. Henderson*⁷¹ the Texas supreme court affirmed both the trial court and the court of appeals⁷² and held that no right of survivorship existed in the account at issue.⁷³ The signature card, which the decedent and her sister, who was the joint tenant in the account, both executed, did not expressly provide that the surviving joint tenant would become the owner of the account.⁷⁴ The court agreed with prior decisions⁷⁵ that Probate Code section 439(a)⁷⁶ does not allow parol evidence nor a rebuttable presumption to create a right of survivorship when the written account agreement signed by the decedent does not specifically create a survivorship right.⁷⁷ The dissent⁷⁸ would have held that the agreement created a right of survivorship in the decedent's sister.⁷⁹ The San Antonio

68. *Id.* at 765. The court found that the fact that the testator wrote words expressing his intent of voiding and canceling the gift across the dispositive provisions of the codicil was sufficient to revoke the codicil. *Id.*

69. *Id.* at 765-66. The court noted that the revocation of a codicil would not result in the revocation of the underlying will unless the revocation language expressly revoked the will. *Id.* at 765, citing *Baker v. Wright*, 157 S.W.2d 470, 471 (Tex. Civ. App.—San Antonio 1941, writ ref'd) and *Logue v. Scrivener*, 355 S.W.2d 87, 89 (Tex. Civ. App.—San Antonio 1962, writ ref'd n.r.e.). The court also noted that the beneficiary under the codicil supported the admission of the will to probate. 795 S.W.2d at 766.

70. *Stauffer v. Henderson*, 801 S.W.2d 858 (Tex. 1990); *Martinez v. Martinez*, 805 S.W.2d 873 (Tex. App.—San Antonio 1991, no writ).

71. 801 S.W.2d 858 (Tex. 1990).

72. 746 S.W.2d 533, 536 (Tex. App.—Amarillo 1988). For a discussion of the appeals court's opinion in this case, see Lynne McNeil Candler, *Wills and Trusts, Annual Survey of Texas Law*, 43 Sw. L.J. 305, 317-18 (1989).

73. 801 S.W.2d at 866.

74. The card provided that the account was a joint account, that both parties could act in all matters concerning the account, and that the survivor could withdraw the funds in the account on the death of the first joint tenant. *See id.* at 859.

75. *See Chopin v. InterFirst Bank*, 694 S.W.2d 79, 84 (Tex. App.—Dallas 1985, writ ref'd n.r.e.); *Magee v. Westmoreland*, 693 S.W.2d 612, 616 (Tex. App.—San Antonio 1985, writ ref'd n.r.e.).

76. TEX. PROB. CODE ANN. § 439(a) (Vernon Supp. 1992), which applies to rights of survivorship in joint accounts, states, in part, the following:

Sums remaining on deposit at the death of a party to a joint account belong to the surviving party or parties against the estate of the decedent if, by a written agreement signed by the party who dies, the interest of such deceased party is made to survive to the surviving party or parties. . . . A survivorship agreement will not be inferred from the mere fact that the account is a joint account.

77. 801 S.W.2d at 865. The thrust of the court's holding is that account agreements for accounts that provide survivorship rights should plainly state that the account is held in the names of the depositors with right of survivorship.

78. *Id.* at 866-72 (Ray, J., dissenting). The dissent discussed the legislative history behind TEX. PROB. CODE ANN. § 439(a) and concluded that the legislature intended to make no changes in the common law meaning of "makes to survive." *Id.* at 866-69. The dissent also stated that the majority in its opinion destroyed the "common sense approach" of allowing statements in account agreements to the effect that the funds would be payable to the survivor to create a rebuttable presumption of survivorship. *Id.* at 871.

79. *Id.* at 872.

court of appeals in *Martinez v. Martinez*⁸⁰ also reached the conclusion that a signature card did not create a right of survivorship.⁸¹ The signature card, which both the decedent and her brother, who claimed survivorship rights in the account, signed, stated that the bank could pay the funds to either joint depositor, whether before or after the death of the other joint depositor. The court found that the signature card was not an agreement in writing creating survivorship rights.⁸²

III. HEIRSHIP

The Texas supreme court, in *Dickson v. Simpson*,⁸³ held that the Texas statutory scheme for establishing paternity violated the petitioner's Fourteenth Amendment⁸⁴ right to establish heirship.⁸⁵ The petitioner, who is the decedent's alleged natural daughter, sought to contest his will. The trial court found that the petitioner did not have standing to contest the will because the statute of limitations for establishing her paternity had run. The court of appeals affirmed.⁸⁶ The supreme court concluded that the petitioner never had the opportunity to institute a proceeding for determination of paternity under chapter 13 of the Family Code,⁸⁷ resulting in the violation of her equal protection right.⁸⁸

In *Hunter v. Koisch*⁸⁹ the Beaumont court of appeals held that a testator's will was not void merely because he executed the will prior to the time that he adopted an adult child.⁹⁰ The testator executed a will in 1958 in which he named his wife as his sole beneficiary. At the time he executed the will the decedent had no children. In 1973 the decedent and his wife adopted their niece, who was an adult at the time of the adoption. The decedent died without executing a will subsequent to the 1958 will, and his wife offered the will for probate. Following the decedent's death, his wife executed a new will under which she left her adopted daughter certain property and one-fifth

80. 805 S.W.2d 873 (Tex. App.—San Antonio 1991, no writ).

81. *Id.* at 880.

82. *Id.*

83. 807 S.W.2d 726 (Tex. 1991).

84. U.S. CONST. amend. XIV, § 1.

85. 807 S.W.2d at 728.

86. *Dickson v. Simpson*, 781 S.W.2d 723, 725 (Tex. App.—Austin 1989). For a discussion of the opinion of the court of appeals in this case, see Lynne McNiel Candler, *Wills and Trusts, Annual Survey of Texas Law*, 45 Sw. L.J. 671, 671-72 (1991).

87. TEX. FAM. CODE ANN. §§ 13.01-.09 (Vernon Supp. 1992). At the time of the decedent's death, a natural child could bring an action for determination of paternity only up until the time the child was twenty years old. Act of May 24, 1983, ch. 744, § 1, 1983 Tex. Gen. Laws 4531. Prior to 1983 the age limits for a child bringing an action for determination of paternity were even lower than the twenty years. Because petitioner was over fifty years old in 1983, she never had the opportunity to bring an action for determination of paternity.

88. 807 S.W.2d at 727. The court determined that "a statutory classification based on illegitimacy violates equal protection unless it is substantially related to an important governmental interest." *Id.* The court then decided that TEX. FAM. CODE ANN. §§ 13.01-.09 (Vernon Supp. 1992), which govern the manner of determination of paternity, bear no substantial relationship to the furtherance of the state's interest in the orderly administration of decedent's estates. 807 S.W.2d at 727.

89. 798 S.W.2d 857 (Tex. App.—Beaumont 1990, writ denied).

90. *Id.* at 860.

of her residuary estate. Following her mother's death, the adopted daughter, who had qualified as administrator with will annexed of her mother's estate, filed a petition for determination of heirship in her father's estate. The daughter contended that under the terms of Probate Code section 67(b)⁹¹ she should be entitled to a share of her father's estate because his will was void since he adopted her after the date of his will. The thrust of the daughter's argument was that, because of the reference to the surviving spouse being the parent of all of the testator's children "exclusive of adopted children,"⁹² she could void her father's will as an adopted child even though a natural child could not. The court disagreed and held that the quoted phrase gave the daughter no greater rights than she would have had as a natural daughter.⁹³

IV. ESTATE ADMINISTRATION

A. Jurisdiction

In *Mower v. Boyer*⁹⁴ the Texas supreme court held that the judgment of a probate court exercising dominant jurisdiction may not be collaterally attacked in the district court and that the district court must give effect to the probate court's order.⁹⁵ In *Crawford v. Williams*⁹⁶ the Corpus Christi court of appeals held that a district court did not have jurisdiction to hear matters incident to an estate when a county court had previously acquired jurisdic-

91. TEX. PROB. CODE ANN. § 67(b) (Vernon Supp. 1992) provided, at the time that the daughter filed her application for determination of heirship, that a will is void to the extent that the testator executed the will when he had no child, either natural born or adopted, but died following the birth or adoption of a child. Section 67(b) contained an exception to this rule if the testator left the majority of his estate to his surviving spouse, who was the parent of all of the testator's children, "exclusive of adopted children." *Id.*

92. TEX. PROB. CODE ANN. § 67(b) (Vernon Supp. 1992).

93. 798 S.W.2d at 860. The court thus held that the daughter had no standing to file the application for determination of heirship and that the father's will was not void. *Id.* The dissent would have held that an after-adopted child can void a will under the language of the statute. *Id.* at 861-62 (Burgess, J., dissenting).

94. 811 S.W.2d 560 (Tex. 1991).

95. *Id.* at 563. A holder of a promissory note sued on the note in district court and received an interlocutory partial summary judgment against the makers of the note. Following the partial summary judgment, one of the makers of the note died. The holder sued the decedent's estate on the same note in probate court and the probate court rendered judgment that the holder take nothing because the note had been fully satisfied. The holder then continued the district court action. The district court refused to set aside the interlocutory summary judgment and grant the other maker's summary judgment based on the probate court's order. The district court rendered judgment against the surviving maker of the note based on the holder's motions to nonsuit the decedent's estate. The appeals court affirmed the district court and held that res judicata prevented the surviving maker from raising the issue of satisfaction in the probate court because he had not previously raised the defense in the district court. 795 S.W.2d 292, 293 (Tex. App.—Houston [14th Dist.] 1990). The supreme court reversed and rendered because res judicata did not apply when the district court did not consider the defense of satisfaction in its summary judgment, the probate court exercised its jurisdiction and rendered a final judgment, and the district court should have barred the holder's relitigation of the issue when the probate court found that the maker had fully satisfied the note. 811 S.W.2d at 563.

96. 797 S.W.2d 184 (Tex. App.—Corpus Christi 1990, writ denied).

tion over the estate by admitting the decedent's will to probate.⁹⁷ In *Carlisle v. Bennett*⁹⁸ the Corpus Christi court of appeals determined that the proper probate court of Lamb County had exclusive jurisdiction to resolve matters incident to the settlement of an estate, to the exclusion of the district court in Cameron County.⁹⁹ In a mandamus proceeding, the Amarillo court of appeals, in *Preston v. Overstreet*,¹⁰⁰ found that a trial court has discretion to determine whether to assign a matter to a statutory probate judge rather than a district court.¹⁰¹ In *Bunnell v. Jordan*¹⁰² a Houston court of appeals determined that the trial court did not err in transferring a suit from district court to the probate court because the matters at issue arose from a difference of opinion about the interpretation of a will.¹⁰³ In *Estate of Torrance v.*

97. *Id.* at 185-86. The constitutional county court of Matagorda County admitted the decedent's will to probate in 1968. Many years later certain of the decedent's heirs filed suit in district court in which they requested a partition of the real property contained in the estate, an accounting, a declaration that the decedent's will was void, and a distribution of the decedent's real property to her heirs. The district court found that the decedent executed the will as the result of undue influence and set the will aside. The district court then determined heirship, partitioned the real property to the decedent's heirs, and ordered an accounting. The court of appeals found that the constitutional county court acquired jurisdiction when it admitted the will to probate. *Id.* at 185. The county court thus had jurisdiction over the partition suit, which was a matter incident to the estate. *Id.* Although the county court could have transferred the matter to the district court, the county court did not do so and the district court could not obtain jurisdiction over the matter even if the county court had not retained jurisdiction. *Id.* at 186. The court also held that the portion of the suit attacking the validity of the will was a "direct attack on the county court's order admitting the will to probate," so the district court did not have jurisdiction to set the will aside. *Id.*

98. 801 S.W.2d 589 (Tex. App.—Corpus Christi 1990, no writ).

99. *Id.* at 591-92. The district court in Lamb County ordered the executor of the estate to sell certain of the estate's real property. The executor sold the real property to her daughter. One of the beneficiaries of the estate brought an action in Cameron County, alleging that the executor, acting only in her individual capacity, and her daughter conspired to damage him through the sale of the real property. The district court in Cameron County agreed with the executor and her daughter that it did not have jurisdiction over the matter and dismissed the suit. The appeals court found that the sale of the property was incident to the estate and, in fact, was directly related to the settlement of the estate, so the appropriate probate court in Lamb County, whether the county court or the district court, would have exclusive jurisdiction over the matter. *Id.* at 591. The court also noted that the district court in Lamb County had dominant jurisdiction over the matter because it was the first court to acquire jurisdiction over the matter. *Id.* at 592.

100. 802 S.W.2d 734 (Tex. App.—Amarillo 1990, no writ).

101. *Id.* at 735. The judge of the district court filed a motion to transfer the contested matter to district court from the Childress County Court and recused himself after the relator served the judge as a party to the relator's motions. The Childress County judge also recused himself. The county judge of Potter County heard the motions filed by relator and the district judge and ordered the transfer of all contested matters to the district court. The relator sought mandamus relief on the basis that the Potter County judge should have assigned a statutory probate judge to hear the matters. The appeals court did not determine whether the language of TEX. PROB. CODE ANN. § 5(b) (Vernon Supp. 1992) mandates the assignment of contested matters to a statutory probate judge, but instead focused on the fact that the trial judge had two motions before him and that he had the discretion to determine which of the motions to grant. *Id.* The court noted that the legislature has provided no guidance for a judge in the situation in which a judge faces two motions of equal stature, so the trial judge must exercise his own discretion. *Id.*

102. 807 S.W.2d 1 (Tex. App.—Houston [1st Dist.] 1991, writ denied).

103. *See id.* at 3. The probate court consolidated two actions for trial. The first action, filed in the probate court by a former attorney for the executor of the estate, was for payment of legal fees. The second action, filed in the district court by the executor individually and in

*State*¹⁰⁴ the El Paso court of appeals held that the probate court had original jurisdiction over a proceeding determining heirship.¹⁰⁵

B. Application for Letters of Administration

In *George v. George*¹⁰⁶ the Tyler court of appeals held that the trial court entered an invalid order granting letters of administration because the applicant failed to state in his application for issuance of letters of administration that the decedent had a surviving spouse.¹⁰⁷ The decedent died in 1987, survived by his spouse. The decedent's brother filed an application for issuance of letters of administration and the court, based upon the application, entered an order issuing letters of administration to the brother. The decedent's spouse qualified as executor of his estate in a Colorado proceeding under the terms of the decedent's last will and testament. The brother's application stated that the decedent died intestate and further contained no mention of the decedent's surviving spouse. After entry of the order issuing letters of administration, the surviving spouse brought an appeal by writ of error.¹⁰⁸ The spouse alleged that the brother's application did not meet the requirements of Probate Code section 82¹⁰⁹ because the brother failed to list

her capacity as executor, as well as by three corporations wholly owned by the executor, alleged that the attorney breached fiduciary duties, which resulted in gross negligence, legal malpractice, and deceptive trade practices. The probate court entered an order of consolidation and the district court transferred its case to the probate court. The jury found that the estate should pay the attorney his fees and denied all of the executor's claims. On appeal the court found that all of the issues involved arose from the settlement of the estate so the probate court had jurisdiction to hear the matters. *Id.* The court noted that the executor failed to establish what claims she brought on behalf of the corporations or how she brought the claims as a shareholder derivative suit. *Id.*

104. 812 S.W.2d 393 (Tex. App.—El Paso 1991, no writ).

105. *Id.* at 397. The decedent, who was a resident of New York, died intestate in 1959. The decedent owned mineral interests in Ector County, Texas, and the public administrator of the County of New York brought ancillary probate proceedings in the Ector County Court in October 1972. The State of Texas intervened in 1974 and asserted that the decedent had no heirs. On July 28, 1975, the decedent's heirs filed an application for determination of heirship in the county court. The application for determination of heirship listed fifty-six heirs. On August 13, 1975, the District Court of Ector County entered a judgment escheating the mineral property to the State as of the date of the decedent's death. The district court's judgment did not list the heirs as parties, except through an attorney ad litem, and indicated that all other parties had withdrawn or abandoned their claims or the court had previously determined that the parties had no claims. The appeals court indicated that it could not determine whether the fifty-six heirs listed on the application for determination of heirship filed in the county court had any notice of the district court proceeding. The court noted that no order transferring the application for determination of heirship was in the record, so the county court retained dominant probate jurisdiction. *Id.* at 395. The court held that the probate courts have exclusive original jurisdiction for determination of heirship, and that a court must first make a determination of heirship before a determination of escheat for lack of heirs. *Id.* at 396-97.

106. 813 S.W.2d 236 (Tex. App.—Tyler 1991, no writ).

107. *Id.* at 238.

108. See *id.* at 237. The surviving spouse demonstrated that she brought her appeal within six months of the date the trial court entered its order and that she did not participate in the trial. The court determined that the only additional matter the spouse had to prove was the whether the record showed error on its face. *Id.*

109. TEX. PROB. CODE ANN. § 82 (Vernon Supp. 1992).

her as an heir of the decedent.¹¹⁰ The brother failed to give the spouse any notice of the proceeding, and she did not attend. As the decedent's surviving spouse, the spouse would receive preference from the court in its appointment of an administrator of the decedent's estate. The court concluded that because the brother failed to notify the trial court of the spouse's existence in the application, the order authorizing letters of administration was invalid.¹¹¹

C. Executors and Administrators

In *Beaumont Bank, N.A. v. Buller*¹¹² the Texas supreme court analyzed the "turnover" statute¹¹³ in the context of an estate administration and determined that the turnover statute could allow a judgment creditor to reach assets held by the personal representative of an estate, the judgment debtor, in her representative capacity, but not in her individual capacity.¹¹⁴ At the time of his death, the decedent and his wife jointly owned a \$100,000 certificate of deposit at a bank in Lumberton. The decedent also served as guarantor on promissory notes held by Beaumont Bank totalling almost \$200,000. Shortly after the decedent's death, his widow, who served as independent executor of his estate, had the proceeds of the certificate of deposit transferred to her attorney's trust account. At approximately the same time, the Beaumont Bank contacted the executor and her attorney about having the estate put up the certificate of deposit as additional collateral against the promissory notes. The attorney eventually revealed to the bank that the certificate of deposit had been transferred to his trust account. Soon thereafter, the notes went into default and the bank filed suit on the notes. The bank recovered a judgment, then sought turnover relief. The trial court granted the bank turnover relief for just under \$100,000. The appeals court found that the executor held the proceeds of the certificate of deposit and thus held the property of a judgment debtor.¹¹⁵ The appeals court held that the turnover statute could only reach the executor in her fiduciary capacity and that the trial court erred in imposing liability on the executor in both her fiduciary and individual capacities.¹¹⁶ The dissent expressed the opinion that the bank had an adequate remedy under Probate Code section 328¹¹⁷ so that the

110. TEX. PROB. CODE ANN. § 3(o) (Vernon Supp. 1992) provides that a surviving spouse is an heir of the decedent.

111. 813 S.W.2d at 238.

112. 806 S.W.2d 223 (Tex. 1991).

113. TEX. CIV. PRAC. & REM. CODE ANN. § 31.002 (Vernon Supp. 1992). This statute provides a method for a judgment creditor to reach a judgment debtor's property that otherwise could not be readily attached and is not exempt from execution.

114. 806 S.W.2d at 227.

115. *Id.* at 226. Once the trial court determined that the executor held the assets, the court held that the burden for the bank to prove that the executor held the assets shifted to the executor to prove that she no longer had the assets in her possession. *Id.* The trial court found that the executor did not prove that she no longer held the proceeds of the certificate of deposit and the supreme court found that the trial court did not abuse its discretion in so finding. *Id.* at 227.

116. *Id.* at 227.

117. TEX. PROB. CODE ANN. § 328 (Vernon 1980 & Supp. 1992).

bank's use of the turnover statute was inappropriate.¹¹⁸

In *Walker v. Sharpe*¹¹⁹ the Corpus Christi court of appeals held that the probate court could not enter an order confirming sale of real property without having first entered an order authorizing the sale.¹²⁰ The widow of a decedent, allegedly in her capacity as independent executor, sold her home to a third party. The purchaser later found that the widow had not been named independent executor in her husband's will and requested the probate court to enter an order confirming the sale. Other controversies arose between the widow and the purchaser, which the parties litigated in district court. The purchaser alleged that the probate court's order confirming the sale served as *res judicata* to the district court action. The widow filed a bill of review and motion in the probate court requesting the court to set aside its order confirming the sale. The widow alleged that the probate court could not enter the order confirming the sale without receiving a report of sale and proper citation and notice. The probate court ruled against the widow and awarded the purchaser attorney's fees on the basis that the widow filed her bill of review in bad faith. The appeals court found that the widow had the right to raise her complaints in a bill of review and that the probate court's confirmation order was inappropriate because the probate court had not first entered an order authorizing the sale of the property.¹²¹

In *McAdams v. Capital Products Corp.*¹²² the Fort Worth court of appeals held that the statute of limitations barred an administrator's claim when the administrator had no authority to pursue the claim in a representative capacity at the time she filed her original pleading and she did not receive authority to do so until after the statute of limitations had run.¹²³ The administrator had been appointed administrator of her daughter's estate in Arkansas. The administrator filed a DTPA claim in Texas in her capacity as administrator even though no Texas court had granted her authority to act on behalf of her daughter's estate. The administrator filed her original claim within two years of her daughter's death, but she did not receive letters of administration in Texas until well over three years following her daughter's death. The appeals court found that the administrator did not assert her claim in her capacity as a duly appointed Texas administrator until after the statute of limitations had run and held that the amended petition could not relate back to her original petition because she filed the original petition in a representative capacity that she did not have.¹²⁴

118. 806 S.W.2d at 229-30 (Mauzy, J., dissenting). The dissent stated that following TEX. PROB. CODE ANN. § 328(b) (Vernon 1980) would allow the court to determine the parties' substantive rights. *Id.* at 230.

119. 807 S.W.2d 448 (Tex. App.—Corpus Christi 1991, writ denied).

120. *Id.* at 451.

121. *Id.* The court stated that both the order of sale and the confirmation order are necessary under the Probate Code. *Id.* at 450. The court found that the probate court could not enter an order confirming the sale without first authorizing the sale in an order. *Id.* at 451, citing *Ball v. Collins*, 5 S.W. 622, 623 (Tex. 1887) and *Loving v. Clark*, 228 S.W. 590, 593-94 (Tex. Civ. App.—Amarillo 1921, no writ).

122. 810 S.W.2d 290 (Tex. Civ. App.—Fort Worth 1991, writ denied).

123. *Id.* at 293.

124. *Id.*

In *Crenshaw v. Chapman*¹²⁵ the Waco court of appeals determined that the trial court had improperly denied a co-executor her right to a jury trial.¹²⁶ The decedent died testate in 1988. The court appointed the decedent's surviving spouse and his daughter from a prior marriage as co-executors pursuant to the terms of the decedent's will. A controversy arose between the co-executors in 1989 when the spouse filed a declaratory judgment action concerning the community versus separate property nature of some of the estate assets. The daughter counterclaimed and alleged that her step-mother had breached her fiduciary duty and grossly mismanaged the estate. The spouse filed an answer to the counterclaim, made a jury demand and paid the jury fee, then set the case for trial on the jury docket two months after the date upon which the court coordinator set the trial. The daughter then filed a motion to remove her step-mother as co-executor and as co-trustee of the trust established by the decedent. The court ordered the daughter's motion set for trial approximately one month prior to the date of the jury setting. The court conducted a bench trial and removed the spouse as co-executor and co-trustee and also placed a "freeze"¹²⁷ on some assets that the spouse had withdrawn from the estate in order to satisfy a specific bequest. The spouse appealed and the appeals court found that the trial court improperly denied the spouse her right to a jury trial.¹²⁸ The court found that the motion to remove that the daughter filed was merely an amended pleading that should have been tried to the jury.¹²⁹ The court also found that the trial court's imposition of a "freeze" upon the assets withdrawn to satisfy the specific bequest amounted to a temporary injunction that the trial court improperly granted.¹³⁰ The trial court failed to set a bond in connection with the temporary injunction¹³¹ and it also failed to set a date for hearing on the issues underlying the request for temporary injunction.¹³²

In *Lesikar v. Rappeport*¹³³ the Texarkana court of appeals determined that a co-executor should make a partial distribution of the estate to the other co-executor because the estate had sufficient assets to pay its debts.¹³⁴ The decedent named his two daughters co-executors of his will and gave each of the daughters a life estate in one-half of his residuary estate. One of the daughters assumed the bulk of the work connected with estate administration. The other daughter first petitioned for distribution of the estate some six years following the decedent's death, which resulted in an earlier

125. 814 S.W.2d 400 (Tex. App.—Waco 1991, no writ).

126. *Id.* at 402.

127. *Id.* at 401.

128. *Id.* at 402. The court found that the spouse properly demanded a jury trial in a timely manner. *Id.*

129. *Id.*

130. *Id.*

131. TEX. R. CIV. P. 684 provides that the court must require the person seeking a temporary injunction to file a bond.

132. TEX. R. CIV. P. 683 requires the trial court to set a hearing on the underlying issues.

133. 809 S.W.2d 246 (Tex. App.—Texarkana 1991, no writ).

134. *Id.* at 251. The court stated that all of the estate's assets are liable for the estate's debts, although this estate had more than adequate cash to pay the debts. *Id.*

appeal.¹³⁵ The court at that time remanded the case to the trial court for a determination of whether the necessity for administration still existed. On remand, the jury found that the estate still required administration and that a partial distribution would result in committing waste or injuring creditors. On the second appeal, the court found that the estate could make a partial distribution without committing waste¹³⁶ and that a partial distribution of estate assets would not harm the estate's creditors.¹³⁷ The court also found that evidence supported the validity of the executor's deduction from an income distribution for amounts the beneficiary owed the estate.¹³⁸ On motion for rehearing,¹³⁹ the court awarded the co-executor against whom the action was brought her attorney's fees because the jury found that she defended the action in good faith.¹⁴⁰

D. Closing Independent Administrations

In two related cases, *Hanau v. Betancourt*¹⁴¹ and *Estate of Hanau*,¹⁴² the Corpus Christit court of appeals considered the effect of the filing of a verified final account in an independent administration.¹⁴³ Both cases arise from the same estate and concern the ongoing conflict between the decedent's two children from a previous marriage and his surviving spouse, who served as independent executor. In *Hanau v. Betancourt*¹⁴⁴ the children sought mandamus relief to force the trial court to enforce its order that the surviving spouse distribute particular stocks to them. The independent executor had filed a verified final account, which terminated the estate administration under Probate Code section 151(b).¹⁴⁵ The court noted that the executor would still be liable individually if she were found guilty of mismanagement or if she made any false statements in the closing affidavit.¹⁴⁶ The court denied the petition for writ of mandamus because the children had an ade-

135. In re Estate of Lewis, 749 S.W.2d 927 (Tex. App.—Texarkana 1988, writ denied). For a discussion of the opinion in that case, see Lynne McNeil Candler, *Wills and Trusts, Annual Survey of Texas Law*, 43 Sw. L.J. 305, 308 (1989).

136. 809 S.W.2d at 250. The court stated that delivery of estate assets to the beneficiary might actually prevent waste. *Id.* The court found that the result does not change merely because the distribution would be to a life tenant and that delivery of the life estate to the life tenant is not an invasion of corpus. *Id.*

137. *Id.* at 251. The court also stated that "an estate representative may not indefinitely prolong administration simply by delaying the payment of debts when there are sufficient assets to pay them." *Id.*

138. *Id.* The other co-executor had incurred the expenses and paid them in connection with production costs on oil and gas leases and operating expenses on a ranch. The court found that the evidence supported a reduction from the beneficiary's distribution for repayment of those amounts. *Id.*

139. The opinion on Motion for Rehearing is published both at 806 S.W.2d 262 (Tex. App.—Texarkana 1991, no writ) and 809 S.W.2d at 252-53.

140. 806 S.W.2d at 263; 809 S.W.2d at 252.

141. 800 S.W.2d 371 (Tex. App.—Corpus Christi 1990, orig. proceeding).

142. 806 S.W.2d 900 (Tex. App.—Corpus Christi 1991, writ denied).

143. *Hanau v. Betancourt*, 800 S.W.2d at 373; *Estate of Hanau*, 806 S.W.2d at 904.

144. 800 S.W.2d 371.

145. TEX. PROB. CODE ANN. § 151(b) (Vernon 1980).

146. 800 S.W.2d at 373. TEX. PROB. CODE ANN. § 151(c) (Vernon 1980) provides that beneficiaries under a will may enforce their rights under the will by a law suit.

quate remedy at law.¹⁴⁷ In *Estate of Hanau*¹⁴⁸ the court determined that the executor had in fact met all the requirements of Probate Code section 151¹⁴⁹ in her final account and that the trial court correctly found that the executor terminated the independent administration by filing the verified final account.¹⁵⁰

V. GUARDIANSHIPS

In *Malouf v. Malaula*¹⁵¹ the Waco court of appeals held that the district court in which a medical malpractice trial occurred had jurisdiction over the award of attorney's fees in that case rather than the probate court that had jurisdiction over the guardianship of the ward who was the subject of the district court action.¹⁵² Prior to filing the application for guardianship in the county in which they resided, the ward's parents filed a medical malpractice suit as next friends of their child in district court in another county. The parents entered into a contingent fee arrangement with the attorney under the terms of which the attorney would receive fifty percent of the award in the case. The district court appointed the appellant guardian ad litem to represent the minor's interests in the malpractice action. During the pendency of the district court action the parents instituted a guardianship and the county court sitting in probate appointed the father as guardian of the ward's estate. The probate court authorized the guardian to settle the medical malpractice suit and specifically ordered the guardian to pay such sums as fees and costs as the district court ordered. The district court approved the settlement of the malpractice case and disbursed forty percent of the settlement to the minor's attorney. Prior to the entry of the judgment approving the settlement, the district court removed the guardian ad litem. The former ad litem filed a motion for new trial in the district court following the entry of the judgment in an attempt to reduce the attorney's fees. The district court found that the former ad litem lacked standing to file the motion for new trial, as did the Dallas court of appeals when the ad litem attempted to appeal the judgment.¹⁵³ The ad litem then filed a motion with the probate court asking the court to disallow the claim of the attorney's fees in the district court action.¹⁵⁴ The ad litem appealed the county court's de-

147. 800 S.W.2d at 373. The court noted that the children had already instituted suit against the executor individually and in her capacity as executor in Harris County prior to filing the writ of mandamus. *Id.* at 372.

148. 806 S.W.2d 900.

149. TEX. PROB. CODE ANN. § 151(a) (Vernon 1980).

150. 806 S.W.2d at 904. The court also found that the probate court lost probate jurisdiction when the executor closed the estate by filing the final account so that it had no jurisdiction to remove the independent executor and name the son as successor independent executor. *Id.* The court noted that the removal of the independent executor and appointment of a successor was moot once the estate was closed. *Id.*

151. 802 S.W.2d 268 (Tex. App.—Waco 1990, writ denied).

152. *Id.* at 269.

153. The Dallas court of appeals also dismissed the ad litem's mandamus action for the same reason. The ad litem did not appeal the Dallas appeals court's decision and the judgment became final.

154. Technically the attorney did not present a claim to the guardian. The thrust of the ad

nial of this motion to the Waco court of appeals on the bases that the district court did not have jurisdiction to approve the attorney's claim for fees against the minor's estate and that the amount of the award exceeded the statutory limit for contingency fees under Probate Code section 233.¹⁵⁵ The appeals court found that the district court acquired jurisdiction over the medical malpractice action at the time the parents filed the action and that the guardianship proceeding that they later instituted did not divest the district court of its jurisdiction.¹⁵⁶ The court also found that the limitations imposed by Probate Code section 233¹⁵⁷ did not apply at the time the parents entered into the fee contract with the malpractice attorney and could not retroactively impair the terms of the contract.¹⁵⁸

In *Williams v. Scanlan*¹⁵⁹ a Houston court of appeals withdrew its order granting the relator's motion for leave to file petition for writ of mandamus and overruled the motion because the respondent scheduled the trial on the underlying fact issues.¹⁶⁰ The dissent strongly disagreed with the court's decision because the effect of the decision was to postpone relator's right to control her community property.¹⁶¹ The relator's husband developed Alzheimer's disease after they had been married for thirty-five years. The couple had a community estate worth approximately six million dollars at the time of the diagnosis. The couple had no children, and the husband had no siblings. An accountant who had formerly worked for the couple, but who the relator discharged for theft and attempts to convert the couple's assets to his own use, filed an application for temporary guardianship. The court appointed the accountant the temporary guardian and turned over the community estate to the accountant. The relator demanded that the court order the accountant to turn the estate back over to her pursuant to Probate Code section 157.¹⁶² The relator also demanded that the guardian deliver all of the community property to her under the provisions of Probate Code sec-

litem's argument to the county court was that the forty percent fee that the district court awarded was in excess of the one-third maximum contingency fee authorized by TEX. PROB. CODE ANN. § 233 (Vernon 1980).

155. TEX. PROB. CODE ANN. § 233 (Vernon 1980).

156. 802 S.W.2d at 269. The court stated that the district court's jurisdiction dominated the county court's jurisdiction because the district court first acquired jurisdiction over the determination of the attorney's fee. *Id.*

157. TEX. PROB. CODE ANN. § 233 (Vernon 1980).

158. 802 S.W.2d at 270.

159. 807 S.W.2d 901 (Tex. App.—Houston [14th Dist.] 1991, no writ).

160. *Id.*

161. *Id.* at 901-04 (Sears, J., dissenting).

162. TEX. PROB. CODE ANN. § 157 (Vernon 1980) provides that the spouse of the person that the court declares is incompetent shall have the following rights and powers:

manage, control, and dispose of the entire community estate, including the part which the incompetent spouse would legally have power to manage in the absence of such incompetency, Guardianship of the estate of the incompetent spouse shall not be necessary when the other spouse is competent unless the incompetent spouse owns separate property, and then as to such separate property only. The qualification of a guardian of the estate of an incompetent spouse does not deprive the competent spouse of the right to manage, control, and dispose of the entire community estate as provided in this Code.

Id.

tion 158.¹⁶³ The dissent noted that the guardian had denied the relator the use of her property for nine months although the guardian had identified no separate property of the incompetent spouse.¹⁶⁴

In *Cone v. Gregory*¹⁶⁵ a Houston court of appeals overruled the relator's petition for writ of mandamus in which the relator sought to avoid the transfer of a cause of action from a Harris County probate court to the district court in Lubbock County.¹⁶⁶ The relator, who was the guardian of the estates of her minor children, filed suit in the probate court against their father, who served as trustee of a trust created for the benefit of the children. The relator alleged in the suit that the trustee breached his fiduciary duty, was negligent, and self-dealt, and she asked for an accounting, damages, and removal of the trustee. The trustee maintained that the suit properly belonged in the district court in Lubbock County, which is the county in which the trustee resided.¹⁶⁷ The appeals court concluded that the district court had jurisdiction over the suit.¹⁶⁸ The appeals court indicated that venue in Lubbock County may be incorrect, but, if so, the guardian may attack the venue on appeal after final judgment.¹⁶⁹

VI. TRUSTS

A. Resulting Trusts

In *Tricentrol Oil Trading, Inc. v. Annesley*¹⁷⁰ the Texas supreme court found that an individual who held seats on the New York Mercantile Exchange actually held the seats in trust for the benefit of his former employer.¹⁷¹ The corporate employer purchased the seats and placed them in the individual's name while he served as vice president of the corporation. The corporation's owner later sold the corporation and the new owner terminated the individual's employment. The individual failed to advise the new owner of the existence of the seats during negotiations of a release resulting from the termination. When the corporation later learned about the seats, it sought to recover them from the individual. The court held that the

163. TEX. PROB. CODE ANN. § 158 (Vernon 1980) provides that the guardian shall deliver community property to the competent spouse upon demand.

164. 807 S.W.2d at 903.

165. 814 S.W.2d 413 (Tex. App.—Houston 1991 [1st Dist.], no writ).

166. *Id.* at 414, 415.

167. TEX. PROP. CODE ANN. § 115.002(b) (Vernon 1984) provides that the proper venue for an action involving a trust is in the county of the trustee's residence. TEX. PROP. CODE ANN. § 115.001(a) (Vernon 1984) provides that the district court has exclusive jurisdiction over a suit to remove a trustee.

168. 814 S.W.2d at 414. The court noted that TEX. PROB. CODE ANN. § 5A(c) (Vernon Supp. 1992) provides that the probate court and the district court have concurrent jurisdiction over certain matters incident to an estate. 814 S.W.2d at 414. Because TEX. PROP. CODE ANN. § 115.001(a) (Vernon 1984) provides that the district court has exclusive jurisdiction over actions involving the removal of a trustee, the district court has jurisdiction under both the Probate Code and the Property Code, so the court concluded that the district court properly had jurisdiction. 814 S.W.2d at 414.

169. *Id.* at 415.

170. 809 S.W.2d 218 (Tex. 1991).

171. *Id.* at 220-21.

release had no effect on the ownership of the seats and stated that the individual had a duty to convey the seats to the corporation upon his termination.¹⁷² In *Jordan v. Exxon Corp.*¹⁷³ the Texarkana court of appeals determined that the conveyance of mineral interests to an individual as trustee failed to create either an express trust¹⁷⁴ or a resulting trust.¹⁷⁵

B. Constructive Trusts

In *Monnig's Department Stores, Inc. v. Azad Oriental Rugs, Inc. (In re Monnig's Department Stores)*¹⁷⁶ the Fifth Circuit examined the elements of a constructive trust¹⁷⁷ and determined that no constructive trust arose because no evidence of wrongdoing existed on the part of Monnig's.¹⁷⁸ In *Texas Commerce Bank—El Paso, N.A. v. Marsh Media of El Paso (In re Carolin Paxson Advertising, Inc.)*¹⁷⁹ the Fifth Circuit determined that the debtor did not hold assets in a constructive trust for the benefit of the creditors, who

172. *Id.* at 220. The court found that the individual had a duty to convey the seats to the corporation at the time that the corporation requested that he do so. *Id.*

173. 802 S.W.2d 880 (Tex. App.—Texarkana 1991, no writ).

174. *Id.* at 882. The individual took title to the mineral interests as trustee, but no one produced a written document creating a trust. The son of the man who took title to the property testified at trial that his father did not execute a written trust agreement and never executed a written document in which he identified the beneficiaries of the trust, the terms of the trust, or provisions for a successor trustee. The court held that the deed's designation of the individual as trustee was insufficient to create a trust. *Id.* The court noted that TEX. PROP. CODE ANN. §§ 111.001-123.005 (Vernon 1984 and Vernon Supp. 1992) require a written trust instrument for a trust holding real property. *Id.*

175. 802 S.W.2d at 883. The court stated that law will imply a trust, known as a resulting trust, either when an express trust fails or when one person takes title to property for which another has provided the purchase price. *Id.* at 882-83, citing *Nolana Dev. Ass'n v. Corsi*, 682 S.W.2d 246, 250 (Tex. 1984). The conveyance of the mineral interest to the individual as trustee does not manifest the intention on anyone's part to create a trust, the court determined, so no resulting trust arose. *Id.* at 883.

176. 929 F.2d 197 (5th Cir. 1991).

177. *Id.* at 201. The elements identified by the court are as follows: "(1) Breach of an informal relationship of special trust or confidence arising prior to and apart from the transaction in question, or actual fraud . . . ; (2) Unjust enrichment of the wrongdoer . . . ; (3) Tracing to an identifiable res." *Id.* (citations omitted). The court stated that a constructive trust is an equitable remedy that prevents unjust enrichment. *Id.*

178. *Id.* at 203. Azad sold oriental rugs on Monnig's premises under the terms of a license agreement with Monnig's. Azad and Monnig's had operated under the terms of the agreement over two years at the time Monnig's filed for bankruptcy protection. Under the terms of the license agreement, Azad deposited the proceeds from the sale of the rugs in Monnig's cash registers and utilized Monnig's charge slips for customers who wished to charge their purchases. Monnig's undertook all collections on the charged accounts. On the twentieth day of each month Monnig's paid Azad the proceeds that he generated from the sale of his rugs the previous month less applicable taxes and a commission Azad agreed to pay Monnig's under the license agreement. Based on these facts the court determined that no fiduciary relationship existed between Monnig's and Azad. *Id.* at 202. The court further found that Monnig's did not breach a fiduciary relationship even if a fiduciary relationship had existed. *Id.* The parties had no agreement segregating the proceeds from Azad's sales from other sales proceeds collected by Monnig's. The court found that the relationship between Azad and Monnig's most closely resembled that of creditor and debtor and that Monnig's must be guilty of more wrongdoing than nonpayment of a debt before the court would impress a constructive trust. *Id.* at 203.

179. 938 F.2d 595 (5th Cir. 1991).

accordingly could not claim a status other than as conventional creditors.¹⁸⁰ In *Mims v. Beall*¹⁸¹ the Texarkana court of appeals found that the trial court correctly imposed a constructive trust when an individual breached his fiduciary duty to owners of a nonparticipating royalty interest by leasing minerals for an unreasonably low royalty interest.¹⁸²

C. Trustees

In *Nacol v. McNutt*¹⁸³ a Houston court of appeals examined issues surrounding a contract for construction of a barn. The woman who contracted for construction of the barn claimed that she entered the contract not in her individual capacity, but in her capacity as trustee for her grandchildren. The jury found that the contractor contracted for construction of the barn, that the contractor substantially performed under the contract, and determined the amount unpaid under the contract for the contractor's services and materials. The grandmother appealed, alleging that she entered the contract in her fiduciary capacity and her grandchildren did not receive proper notice of the trial. The court found that the grandchildren received adequate notice because they had their own counsel present at trial who fully represented their interests.¹⁸⁴ The court also found that the trustee had the burden to prove that she avoided personal liability on the contract by entering the contract only in her capacity as trustee.¹⁸⁵ The jury found that the grandmother did not inform the contractor that she was contracting only in her fiduciary capacity. Because the grandmother did not meet her burden of proof, she could not escape personal liability on the contract.

In *Hollenbeck v. Hanna*¹⁸⁶ the San Antonio court of appeals found that a trustee owed a duty to provide an accounting to a remainder beneficiary

180. *Id.* at 598-99. The debtor, an advertising agency, bought broadcasting air time for its clients. The stations billed the debtor for the advertising time, after which the debtor billed its clients for the advertising time plus its commission, and then paid the stations. Texas Commerce Bank had taken and perfected a security interest in the debtor's accounts receivables approximately two years prior to the time the debtor filed for bankruptcy protection. The stations claimed that they were entitled to payment on the accounts receivable that represented air time they sold to the debtor. The bankruptcy court found that the debtor held the accounts receivable in a constructive trust for the benefit of the stations and the district court affirmed the bankruptcy court's decision. The court of appeals found that the debtor was not an agent of the stations. *Id.* Because the debtor and the stations only had an independent contractor relationship, the stations stood in the position of a regular creditor. *See id.* at 599.

181. 810 S.W.2d 876 (Tex. App.—Texarkana 1991, no writ).

182. *Id.* at 881. The landowners leased the minerals on their property to their son, who in turn assigned the lease to a third party. The landowners failed to reserve enough of a mineral interest in the lease so that the nonparticipating royalty owners would be assured of receiving their portion of the royalties. The trial court instructed the jury that the holder of executive rights over mineral interests owes nonparticipating royalty owners a fiduciary duty. The jury found that the holder breached his fiduciary duty and found actual and exemplary damages. The appeals court held that sufficient evidence existed that the landowners breached their fiduciary duty and upheld the judgment, *id.*, but reformed the judgment to reflect the actual amount of the damages.

183. 797 S.W.2d 153 (Tex. App.—Houston [14th Dist.] 1990, writ denied).

184. *Id.* at 154.

185. *Id.* at 155.

186. 802 S.W.2d 412 (Tex. App.—San Antonio 1991, no writ).

under both the terms of Trust Code section 113.151¹⁸⁷ and the will that created the trust.¹⁸⁸ The decedent left his family ranch in trust for the benefit of his spouse for her lifetime, with remainder to their daughter. The estate elected a special use valuation under Internal Revenue Code section 2032A.¹⁸⁹ The decedent provided in his will that his daughter would have ongoing management responsibilities over the ranch in order to preserve the special use valuation. The will stated that the trustee would make annual accounts and provide a copy to the decedent's spouse. The daughter requested that the trustee provide her with a copy of the accounting, but the trustee refused. The daughter brought suit to compel the accounting, and the probate court found that the trustee did not have to provide the accounting to the daughter as a remainder beneficiary. The probate court based its decision on an interpretation of the will and section 113.151 of the Trust Code.¹⁹⁰ The probate court determined that, under the terms of the will, the trustee only had to provide the annual account information to the decedent's spouse during her lifetime. The probate court also found that the terms of the will overrode Trust Code provisions concerning accountings. The appeals court determined that the probate court incorrectly interpreted the will because the will did not specifically state that the trustee should not give a copy of the accounting to the remainder beneficiary.¹⁹¹ The court also found that Trust Code section 113.151¹⁹² mandates that the trial court determine whether the beneficiary's interest is sufficient to require the trustee to provide an accounting to the beneficiary and that the probate court failed to make a finding on this issue.¹⁹³ The court thus reversed the order that denied the accounting and remanded the cause for determination of whether the remainder beneficiary had sufficient interest in the trust to receive an accounting.¹⁹⁴

In *Ashmore v. North Dallas Bank & Trust*¹⁹⁵ the Dallas court of appeals held that the successor trustee failed to file an appeal in a timely manner on two orders awarding attorney's fees and custodial fees and that the probate court properly awarded custodial fees and expenses in the one order for which the trustee filed a timely appeal.¹⁹⁶ The bank, which served as successor trustee of several trusts for the benefit of one family, resigned as trustee in December 1987. The bank requested the trust advisors, who had the requisite authority, to appoint a successor trustee. The bank also filed a petition with the probate court for appointment of a successor trustee and for in-

187. TEX. PROP. CODE ANN. § 113.151 (Vernon 1984).

188. See 802 S.W.2d at 415.

189. I.R.C. § 2032A. This section allows real property used in farming or other trades or businesses to qualify for a lower appraised value for federal estate tax purposes under certain circumstances.

190. TEX. PROP. CODE ANN. § 113.151 (Vernon 1984).

191. 802 S.W.2d at 414.

192. TEX. PROP. CODE ANN. § 113.151 (Vernon 1984).

193. 802 S.W.2d at 415.

194. *Id.*

195. 804 S.W.2d 156 (Tex. App.—Dallas 1990, no writ).

196. *Id.* at 160.

structions on how to handle trust assets until the appointment of a successor. Approximately a year after its resignation, the bank, which was still serving as custodian of the trust assets, filed applications with the probate court for attorney's fees for the period from the resignation until shortly before the date of the application and trustee's fees through the date the probate court appointed a temporary receiver. The probate court signed two orders awarding the fees on January 4, 1989. In June 1989, the probate court appointed the temporary receiver as successor trustee of the trusts and ordered the bank to submit a final account to the successor trustee. In October 1989, the bank filed an application for payment of custodian's fees and the probate court entered an order on January 3, 1990, authorizing the payment of part of the custodial fees the bank requested. The successor trustee appealed all three orders on February 2, 1990. The appeals court first found that the January 1989 orders were final, appealable orders.¹⁹⁷ Because the successor trustee brought his appeal more than one year after the probate court entered the orders, he did not appeal the orders in a timely manner and the appeals court had no jurisdiction to hear the appeals.¹⁹⁸ The court then examined the January 1990 award of custodial fees and determined that the probate court properly awarded the custodial fees.¹⁹⁹

D. Modification and Construction of Trusts

In *Musick v. Reynolds*²⁰⁰ the Eastland court of appeals examined the alleged modification of an irrevocable spendthrift trust and determined that, as a matter of law, an irrevocable spendthrift trust may be modified²⁰¹ and that the grantor and beneficiaries of the trust at issue had modified the trust pursuant to a settlement agreement and related documents.²⁰² The grantor funded the trust with two tracts of land. The ownership of one of the tracts of land was the subject of litigation several years after the grantor established the trust. As a result of a settlement agreement designed to resolve the disputes between the parties concerning the ownership of the land, the parties agreed that the grantor's two nephews would receive an undivided one-sixth beneficial interest in the tract in dispute, and the grantor released any ability

197. *Id.* at 158.

198. *Id.* at 158-59.

199. *Id.* at 160. The bank continued to hold the trust assets, prepared accountings, paid bills, and performed many other functions at the request of the temporary receiver/successor trustee. The court found that neither the trust agreements did not prohibit the award of fees nor the holding in *James v. Roberts Tel. & Elec. Co.*, 206 S.W. 933 (Tex. Comm'n App. 1918, judgm't adopted), prevented the award of custodial fees to the bank. 804 S.W.2d at 159. The court distinguished *James* because the holding in that case was that a receiver could not receive fees for his services, not that a custodian could not receive fees for its services. *Id.* Finally, the court found that the probate court did not abuse its discretion in determining the amount of custodial fees to award. *Id.*

200. 798 S.W.2d 626 (Tex. App.—Eastland 1990, writ denied).

201. *Id.* at 629. The court relied on the holding in *Sayers v. Baker*, 171 S.W.2d 547, 551 (Tex. Civ. App.—Eastland 1943, no writ) to determine that if the settlor of the trust is alive and all trust beneficiaries consent, the settlor and all the beneficiaries may consent to modification of the trust. 798 S.W.2d at 629.

202. *Id.* at 630.

that he had to terminate the nephews' interest in the trust. Additionally, the trustee deeded a one-sixth interest to each nephew subject to any of three conditions precedent: (1) the grantor terminated the trust; (2) the trustee terminated the trust pursuant to the terms of the trust agreement; or (3) the grantor revised the trust in an effort to revise the nephews' ownership interests in the tract of land. The nephews quitclaimed all of their interest in the other parcel of land held in the trust, which the trustee later sold. The grantor died and left his estate to the trust, including a 100 acre tract of land. The nephews brought an action in May 1985 in which they sought a determination that they held an equal beneficial interest under the trust with the grantor's two daughters. The trial court granted a summary judgment against the nephews based upon the settlement agreement reached in the earlier litigation. The appeals court determined that an issue of fact existed concerning whether the nephews owned any beneficial interest in the 100 acre tract of land held in the trust and remanded for a trial court determination.²⁰³

In *Myrick v. Moody*²⁰⁴ a Houston court of appeals determined that the language of a trust document was ambiguous and that the trial court erred in granting summary judgment.²⁰⁵ The grantor created a trust for the benefit of three of his children and the children of his fourth child. The trust document specified that the trust would continue for the lives of his children. On the death of a beneficiary of the trust who was a child of the grantor, that child's share of the trust would be distributed to the child's descendants per stirpes. On the death of the grantor's son who was not a trust beneficiary, his children would receive their share of the trust estate. One of the grantor's children died in 1936, survived by two children, and the trustee distributed one-fourth of the trust corpus to the children of the deceased child. Two of the children of the son who was not a beneficiary of the trust died and the trustee paid income to their children. One of the grantor's children died in 1986 without surviving issue and the trustee filed a declaratory judgment for a determination of who the beneficiaries of the deceased beneficiary's share were.²⁰⁶ The trial court determined that the deceased child's share of the income should be evenly divided between her surviving sibling and the surviving grandchild beneficiary. The appeals court held that the trial court correctly determined this issue.²⁰⁷ The court then examined

203. *Id.* at 630-31.

204. 802 S.W.2d 735 (Tex. App.—Houston [14th Dist.] 1990, writ denied).

205. *Id.* at 739.

206. The trust provision for distribution of a share held for the benefit of a child who died without issue stated that the share would be distributed equally to the child's surviving brothers and sisters, with one share going to the surviving children of the child who was not a trust beneficiary. At the time the grantor's child died, two of his children survived, one of whom was a trust beneficiary and the other of whom was the father of the grandchildren beneficiaries of the trust. Only one of the grandchildren beneficiaries of the trust survived at that time. The trustee asked the trial court to determine how to distribute the portion of the share that should pass to the grandchildren beneficiaries when only one of the grandchildren then survived, but the deceased grandchildren beneficiaries had surviving issue who were also beneficiaries of the trust.

207. 802 S.W.2d at 738.

whether the trial court correctly determined the method of corpus distribution. The trial court found that the language of the trust document unambiguously required survivorship of the grantor's child and grandchild in order to receive a corpus distribution. The appeals court found that the language controlling distribution of the corpus was ambiguous and found that the trial court thus incorrectly granted summary judgment.²⁰⁸

VII. LEGISLATIVE UPDATE

A. Probate Jurisdiction

The legislature passed two acts that relate to probate jurisdiction.²⁰⁹ The legislature first amended section 21.009 of the Government Code²¹⁰ to remove statutory probate courts from the definition of statutory county courts²¹¹ and to add the definition of statutory probate court contained in Probate Code section 3²¹² as a separate type of county court.²¹³ The legislature added new sections 25.0026 through 25.0032 to the Government Code,²¹⁴ which relate to the powers and duties of statutory probate courts,²¹⁵ juries,²¹⁶ compensation of judges, fees, facilities, and the seal of

208. *Id.* at 739. The court stated that the language could require survivorship among the original beneficiaries or it could require survivorship among the grantor's children, but not among the grandchildren beneficiaries. *Id.* The trust provided for the corpus distribution to the "surviving brothers and sisters [of the deceased beneficiary] and the children of [the son who was not a beneficiary], collectively." *See id.* The court found that the use of the term "surviving" placed only in front of "brothers and sisters" rather than in front of both "brothers and sisters" and "children" was ambiguous. *Id.*

209. Act of May 17, 1991, 72nd Leg., R.S., ch. 394, 1991 Tex. Sess. Law Serv. 1506 (Vernon); Act of May 17, 1991, 72nd Leg., R.S., ch. 746, 1991 Tex. Sess. Law Serv. 2620 (Vernon). In addition to these acts, the legislature passed two acts applicable to county courts in specific counties. Act of May 25, 1991, 72nd Leg., R.S., ch. 441, 1991 Tex. Sess. Law Serv. 1608, 1609 (Vernon) (creates County Court at Law of Hopkins County and conveys concurrent jurisdiction over probate matters with the county court); Act of May 22, 1991, 72nd Leg., R.S., ch. 512, 1991 Tex. Sess. Law Serv. 1789, 1789-91 (Vernon) (El Paso County Court at Law No. 6 designated the Probate Court of El Paso County).

210. TEX. GOV'T CODE § 21.009 (Vernon Supp. 1992).

211. Act of May 17, 1991, 72nd Leg., R.S., ch. 394, § 1, 1991 Tex. Sess. Law Serv. 1506, 1506 (Vernon), amending TEX. GOV'T CODE § 21.009(2) (Vernon Supp. 1992).

212. TEX. PROB. CODE § 3(ii) (Vernon Supp. 1992).

213. Act of May 26, 1991, 72nd Leg., R.S., ch. 594, § 1, 1991 Tex. Sess. Law Serv. 1506, 1506 (Vernon).

214. TEX. GOV'T CODE §§ 25.0026-.0032 (Vernon Supp. 1992).

215. New § 25.0026 of the Government Code lists the powers and duties of a statutory probate court or its judge. These powers and duties include the following: (1) the power to issue writs for enforcement of the court's jurisdiction and writs of habeas corpus if the case involves an offense within the probate court's jurisdiction or the jurisdiction of any inferior court in the county; (2) the power to punish persons for contempt; (3) and all other powers, duties, immunities, and privileges provided to other county judges by statute. A county probate judge may not, however, exercise authority over the administrative business of the county that is performed by the county judge. In the Act of June 16, 1991, ch. 746, § 7, 1991 Tex. Sess. Law Serv. 2620, 2622 (Vernon), the legislature added new § 25.0026, with the same language, to the Government Code.

216. New Government Code § 25.0027 provides for the method of selecting jury panels. Both the Act of May 26, 1991, 72nd Leg., R.S., ch. 394, § 3, 1991 Tex. Sess. Law Serv. 1506, 1507 (Vernon) and the Act of May 27, 1991, 72nd Leg., R.S., ch. 746, § 8, 1991 Tex. Sess. Law Serv. 2620, 2623 (Vernon) amend section 25.0595(i) of the Government Code to provide that

the court.²¹⁷

The legislature further amended and repealed various sections of the Government Code that relate to county courts.²¹⁸ In an overlapping effort, the legislature amended section 21.009(2) of the Government Code²¹⁹ to remove statutory probate courts, with the exception of the Brazoria County statutory probate court, from the definition of statutory county courts.²²⁰ Effective October 1, 1991, a statutory probate court is the only statutory county court with probate jurisdiction in counties that have statutory probate courts.²²¹ In all other counties, statutory county courts have concurrent probate jurisdiction with the county court as provided by general law.²²²

B. Wills

The legislature amended section 10A of the Probate Code²²³ to add charitable organizations that are distributees under a will as necessary parties to a will contest or will construction suit.²²⁴ The legislature has amended section 58 of the Probate Code²²⁵ to provide that one may not dispose of an expectancy by will²²⁶ and to provide that in a will one may disinherit an heir and direct the disposition passing under the will or by intestacy.²²⁷ Probate Code section 3(ff)²²⁸ now defines "will" as an instrument that may direct how one wishes not to dispose of property²²⁹ in order to make the definition of "will" consistent with the revisions to section 58.²³⁰ A charitable or gov-

section 25.00261 of the Government Code will not apply to statutory probate courts in Dallas County.

217. Act of May 26, 1991, 72nd Leg., R.S., ch. 394, § 2, 1991 Tex. Sess. Law Serv. 1506, 1507 (Vernon).

218. Act of May 27, 1991, 72nd Leg., R.S., ch. 746, 1991 Tex. Sess. Law Serv. 2620-39 (Vernon). This act is quite lengthy and addresses many areas, besides probate, that concern county courts.

219. TEX. GOV'T. CODE § 21.009(2) (Vernon Supp. 1992).

220. Act of May 27, 1991, 72nd Leg., R.S., ch. 746, § 1, 1991 Tex. Sess. Law Serv. 2620, 2620 (Vernon).

221. Act of May 27, 1991, 72nd Leg., R.S., ch. 746, § 3, 1991 Tex. Sess. Law Serv. 2620, 2620-21 (Vernon), adding TEX. GOV'T CODE § 25.003(e).

222. *Id.*, adding TEX. GOV'T CODE § 25.003(d) (effective October 1, 1991).

223. TEX. PROB. CODE ANN. § 10A (Vernon Supp. 1992).

224. Act of May 21, 1991, 72nd Leg., R.S., ch. 675, § 1, 1991 Tex. Sess. Law Serv. 2455, 2455-56 (Vernon). TEX. PROB. CODE ANN. § 10A previously provided that institutions of higher education that were distributees under a will were necessary parties in a will contest or will construction suit. The court must serve the charitable organization in the manner provided in the Probate Code for service on other parties. Charitable organizations that are distributees under a will are necessary parties only if proceedings instituting the contest or will construction suit begin on or after September 1, 1991.

225. TEX. PROB. CODE ANN. § 58 (Vernon Supp. 1992).

226. Act of May 24, 1991, 72nd Leg., R.S., ch. 895, § 6, 1991 Tex. Sess. Law Serv. 3062, 3064 (Vernon) (amends TEX. PROB. CODE ANN. § 58(a)).

227. Act of May 24, 1991, 72nd Leg., R.S., ch. 895, § 6, 1991 Tex. Sess. Law Serv. 3062, 3064 (adds TEX. PROB. CODE ANN. § 58(b)).

228. TEX. PROB. CODE ANN. § 3(ff) (Vernon Supp. 1992).

229. Act of May 24, 1991, 72nd Leg., R.S., ch. 895, § 1, 1991 Tex. Sess. Law Serv. 3062, 3062 (Vernon) (amends TEX. PROB. CODE ANN. § 3(ff)).

230. TEX. PROB. CODE ANN. § 3(ff) (Vernon Supp. 1992). The legislature also amended TEX. PROP. CODE ANN. § 112.053 to echo the provision that one may direct how not to dispose of property. *See infra* note 275 and accompanying text.

ernmental beneficiary has until nine months from the date it receives notice of the probate proceedings, as required under section 128A of the Probate Code,²³¹ to file a written disclaimer rather than the nine months from the date of the decedent's death that pertains to other beneficiaries.²³²

Probate Code section 59²³³ now provides that a signature to a self-proving affidavit may serve as a signature to the will.²³⁴ The legislature further amended Probate Code section 59²³⁵ to modify the statutory form of a will's self-proving affidavit.²³⁶ The legislature amended the section heading of Probate Code section 67²³⁷ to indicate that the section refers to a pretermitted child rather than a pretermitted heir.²³⁸ The legislature extensively revised Probate Code section 68,²³⁹ which is commonly known as the "anti-lapse" statute, to cure several problems that existed with the previous version of the statute.²⁴⁰

231. TEX. PROB. CODE ANN. § 128A (Vernon Supp. 1992).

232. Act of May 24, 1991, 72nd Leg., R.S., ch. 895, § 2, 1991 Tex. Sess. Law Serv. 3062, 3062 (Vernon) (amends TEX. PROB. CODE ANN. § 37A).

233. TEX. PROB. CODE ANN. § 59 (Vernon Supp. 1992).

234. Act of May 24, 1991, 72nd Leg., R.S., ch. 895, § 7, 1991 Tex. Sess. Law Serv. 3062, 3064-65 (Vernon). The legislature amended § 59 in order to cure a so-called "Boren" will, named after the will at issue in *Boren v. Boren*, 402 S.W.2d 728 (Tex. 1966). The court held in *Boren v. Boren*, *id.* at 729-30, and again in *Wich v. Fletcher*, 652 S.W.2d 353, 355 (Tex. 1983), that a will is not valid if the witnesses fail to sign the will itself, but instead sign only the self-proving affidavit. Under the revision to § 59, a "Boren" will shall not be invalidated, but it shall also not be admitted to probate as a properly executed self-proving will. Thus, the applicant for probate shall have to offer the court proof of the execution of the will with proper formalities under TEX. PROB. CODE § 84(b) (Vernon 1980) and proof of the legal capacity of the testator to make the will under TEX. PROB. CODE § 88(b) (Vernon 1980).

235. TEX. PROB. CODE ANN. § 59 (Vernon Supp. 1992).

236. Act of May 24, 1991, 72nd Leg., R.S., ch. 895, § 7, 1991 Tex. Sess. Law Serv. 3062, 3064-65 (Vernon). The new form of the self-proving affidavit states that both the testator and the witnesses swear to the will and its execution. Formerly, the testator acknowledged the will and the witnesses swore to the information stated in the self-proving affidavit. In one case, *Cutler v. Ament*, 726 S.W.2d 605 (Tex. App.—Houston [14th Dist.] 1987, writ ref'd n.r.e.), the testator swore to the self-proving affidavit and the witnesses acknowledged the instrument. The court held that the will was not self-proved because the witnesses acknowledged the document. *Id.* at 607-08. The new form of the self-proving affidavit will eliminate this potential problem. Fortunately, self-proving affidavits that comply with the language from § 59 prior to this amendment will substantially comply with the new statute. See TEX. PROB. CODE ANN. § 59(b) (Vernon Supp. 1992).

237. TEX. PROB. CODE ANN. § 67 (Vernon Supp. 1992).

238. Act of May 24, 1991, 72nd Leg., R.S., ch. 895, § 8, 1991 Tex. Sess. Law Serv. 3062, 3066 (Vernon). Because the section deals with pretermitted children rather than pretermitted heirs, the section heading now accurately reflects its content.

239. TEX. PROB. CODE ANN. § 68 (Vernon Supp. 1992).

240. Act of May 24, 1991, 72nd Leg., R.S., ch. 895, § 9, 1991 Tex. Sess. Law Serv. 3062, 3066 (Vernon). Previously, § 68 provided for the distribution of a devise intended for a predeceased descendant to the predeceased descendant's issue. Section 68(a) extends this rule to the descendants of the testator's parents. Thus, under the former statute, if a testator had devised a gift to his child and the child predeceased him, the gift would have passed to the deceased child's children, but the same result would not have followed if the testator devised a gift to his sister and she had predeceased him; by amending the statute, the legislature cured this anomaly. Section 68(a) now clarifies that the provision for passage of a devise applies to class gifts as well as to specific bequests, thus avoiding the issue raised in dictum in *White v. Moore*, 760 S.W.2d 242, 244 (Tex. 1988). A lapsed specific bequest will pass as part of the residuary estate if it is not made to a descendant of the testator's parents under § 68(b). Section 68(c) changes the former Texas rule that a lapsed residuary bequest would pass by intestacy to provide that

C. Intestacy

Both Probate Code sections 43²⁴¹ and 45²⁴² now provide for intestate distribution of property under a per capita with representation approach.²⁴³ The legislature has clarified that an affidavit of heirship is valid whether acknowledged or verified by jurat.²⁴⁴

D. Estate Administration

Personal representatives must now provide additional information in the published notice, including the time of issuance of letters, the address to which the personal representative wishes claims to be presented, and the personal representative's choice of how creditors should address the claims.²⁴⁵ Personal representatives must now give notice to each creditor having an unpaid claim against the estate within four months after the personal representative receives letters if the personal representative has knowledge of the claim.²⁴⁶ A personal representative may now purchase property from an estate if the court approves the sale after determining that the sale is in the estate's best interest and if the personal representative has previously provided notice of the intended sale to each beneficiary and each creditor whose claim remains unpaid.²⁴⁷

The legislature amended Probate Code section 145²⁴⁸ to provide that a court may appoint a person who resigns or declines to serve as independent executor or administrator of an estate as dependent executor or administra-

lapsed residuary bequests will pass to the other residuary beneficiaries; pursuant to § 68(d) residuary bequests will now only pass by intestacy when all of the residuary beneficiaries have predeceased the testator and none of them are descendants of the testator's parent.

241. TEX. PROB. CODE ANN. § 43 (Vernon Supp. 1992). Section 43 provides for intestate distribution of separate property. Formerly, § 43 did not clearly specify whether distribution would be made under a "per capita with representation" approach or under a pure *per stirpes* approach if the intestate had no surviving children, but had more distant surviving descendants.

242. TEX. PROB. CODE ANN. § 45 (Vernon Supp. 1992). Section 45 deals with inheritance of the community estate of a decedent. It formerly provided for inheritance strictly on a *per stirpes* basis.

243. Act of May 24, 1991, 72nd Leg., R.S., ch. 895, §§ 3,4, 1991 Tex. Sess. Law Serv. 3062, 3064 (Vernon).

244. Act of May 24, 1991, 72nd Leg., R.S., ch. 895, § 5, 1991 Tex. Sess. Law Serv. 3062, 3064 (Vernon) amends TEX. PROB. CODE ANN. § 52 to provide that sworn instruments, as well as acknowledged instruments, may be recorded.

245. Act of May 21, 1991, 72nd Leg., R.S., ch. 464, § 1, 1991 Tex. Sess. Law Serv. 1686 (Vernon) (codified at TEX. PROB. CODE ANN. § 294(a) (Vernon Supp. 1992)). The personal representative may choose to have the claims addressed in care of the personal representative, the representative's attorney, or in care of the representative and naming the estate. Act of May 21, 1991, 72nd Leg., R.S., ch. 464, § 1, 1991 Tex. Sess. Law Serv. at 1686.

246. Act of May 24, 1991, 72nd Leg., R.S., ch. 895, § 13, 1991 Tex. Sess. Law Serv. 3062, 3067-68 (Vernon) amends TEX. PROB. CODE ANN. § 295(b). The legislature enacted this change in order to ensure that the situation raised in *Tulsa Professional Serv., Inc. v. Pope*, 485 U.S. 478 (1988), does not arise. The Court held in *Pope* that the personal representative must give actual notice to reasonably ascertainable creditors prior to barring their claims against the estate. 485 U.S. at 491.

247. Act of May 24, 1991, 72nd Leg., R.S., ch. 895, § 14, 1991 Tex. Sess. Law Serv. 3062, 3068 (Vernon).

248. TEX. PROB. CODE ANN. § 145 (Vernon Supp. 1992).

tor.²⁴⁹ Probate Code section 151²⁵⁰ now provides for the release of sureties on bonds of a personal representative if the personal representative files a closing report verified by the personal representative's affidavit and signed receipts from the beneficiaries showing delivery of estate property after payment of all debts.²⁵¹ Probate Code section 152²⁵² now provides that the probate court may require an independent executor to file an affidavit under Probate Code section 151²⁵³ and may include a provision in the order discharging the sureties on the bond from liability on the executor's future acts.²⁵⁴

The legislature has clarified that an executor or administrator may not receive a commission for receiving funds on deposit at a financial institution or with a brokerage house or for collecting life insurance proceeds unless the executor or administrator applies to the court for reasonable compensation for unusual effort in collecting the funds or life insurance proceeds.²⁵⁵ The legislature extensively amended section 322A of the Probate Code²⁵⁶ and its provisions controlling the apportionment of estate taxes and expenses for persons dying after September 1, 1991.²⁵⁷ Under the new provisions of the statute, the personal representative will charge each person who receives an interest in the decedent's estate his or her proportionate share of the estate tax²⁵⁸ unless the decedent has directed otherwise by inter vivos or testamentary instrument.²⁵⁹ Further amendments to section 322A provide for the

249. Act of May 24, 1991, 72nd Leg., R.S., ch. 895, § 10, 1991 Tex. Sess. Law Serv. 3062, 3066 (Vernon).

250. TEX. PROB. CODE ANN. § 151 (Vernon Supp. 1992).

251. Act of May 24, 1991, 72nd Leg., R.S., ch. 895, § 11, 1991 Tex. Sess. Law Serv. 3062, 3066-67 (Vernon). Previously, § 151(a) allowed the personal representative to file a final account, rather than a closing report, but provided no method for the release of a surety on the bond. Section 151(e) extends the provisions of § 151 to a community administration to release the sureties on the community administrator's bond upon the filing of an independent executor's affidavit.

252. TEX. PROB. CODE ANN. § 152 (Vernon Supp. 1992).

253. *Id.* § 151.

254. Act of May 24, 1991, 72nd Leg., R.S., ch. 895, § 12, 1991 Tex. Sess. Law Serv. 3062, 3067 (Vernon).

255. Act of May 22, 1991, 72nd Leg., R.S., ch. 468, § 1, 1991 Tex. Sess. Law Serv. 1695, 1695 (Vernon) (amending TEX. PROB. CODE ANN. § 241(a)). Section 2 of this act, 1991 Tex. Sess. Law Serv. at 1696, added TEX. PROB. CODE ANN. § 241(c) to provide a definition of financial institution.

256. TEX. PROB. CODE ANN. § 322A (Vernon Supp. 1992).

257. Act of May 15, 1991, 72nd Leg., R.S., ch. 410, §§ 1, 2, 1991 Tex. Sess. Law Serv. 1571, 1571-76 (Vernon). The legislature clarified the definition of estate tax contained in TEX. PROB. CODE ANN. § 322A(a)(2), although the definition now provides that any tax imposed under I.R.C. § 2701(d)(1)(A) is not included within the definition of estate tax; interestingly, I.R.C. § 2701(d)(1)(A) does not impose a tax. The legislature also amended the definitions of "person" contained in TEX. PROB. CODE ANN. § 322A(a)(3) and "person interested in the estate" contained in TEX. PROB. CODE ANN. § 322A(a)(4).

258. Act of May 24, 1991, 72nd Leg., R.S., ch. 410, § 1, 1991 Tex. Sess. Law Serv. 1571, 1572 (Vernon) (amended TEX. PROB. CODE ANN. § 322A(b)(1)). The approximate amount of tax for which each recipient of the decedent's estate is responsible is determined by applying the same ratio to the total estate tax as the recipient's portion of the estate bears to the total estate. *Id.*

259. Act of May 15, 1991, 72nd Leg. R.S., ch. 410, § 1, 1991 Tex. Sess. Law Serv. 1571, 1572 (Vernon) (deleted the former language of TEX. PROB. CODE ANN. § 322A(b)(2) and

apportionment of taxes when special use valuation under Internal Revenue Code section 2032A²⁶⁰ applies²⁶¹ or when excess retirement accumulation creates a taxable situation²⁶² under Internal Revenue Code section 4980(d).²⁶³ The legislature amended Probate Code section 378A²⁶⁴ to clarify existing law in Texas relating to pecuniary marital deduction bequests.²⁶⁵

E. Guardianships

A temporary guardianship may now last longer than sixty days if either the application for temporary guardianship or the application to convert a temporary guardianship to a permanent guardianship is subject to a challenge or contest.²⁶⁶ The legislature passed a lengthy act that sets forth the manner of determining relationships by consanguinity or affinity, among other things;²⁶⁷ the manner of determining relationships appears to affect only section 130E(b) of the Probate Code.²⁶⁸

added new language to the effect that the decedent can overrule the state law through written instructions in the instrument that creates the interest).

260. I.R.C. § 2032A.

261. Act of May 15, 1991, 72nd Leg., R.S., ch. 410, § 1, 1991 Tex. Sess. Law Serv. 1571, 1573 (Vernon) (added new TEX. PROB. CODE ANN. § 322A(i)); former § 322A(i) is now § 322A(p).

262. *Id.* at 1573-74 (added new TEX. PROB. CODE ANN. § 322A(j)). The former § 322(j) is now § 322A(q). Additional amendments to § 322A provide, among other things, under § 322A(k) that a recipient of specific property that gives rise to an extension in payment of the estate tax shall receive the benefits and burdens of the extension, under § 322A(n) that the personal representative has the right to recover tax from persons who receive nonprobate property as the result of the decedent's death, and under § 322A(o) that any person who must pay tax in a greater amount than otherwise provided under the statute because another will not pay his or her proportionate amount of tax has the right of reimbursement from the person who failed to pay his or her share of the tax.

263. I.R.C. § 4980(d).

264. TEX. PROB. CODE ANN. § 378A (Vernon Supp. 1992).

265. Act of May 24, 1991, 72nd Leg., R.S., ch. 895, § 15, 1991 Tex. Sess. Law Serv. 3062, 3068-69 (Vernon). The legislature made two amendments to § 378A. First, the legislature amended the statute to allow it to apply to all bequests that qualify for the marital deduction, whether or not the testator intended for the bequest to qualify for the deduction. The legislature next added new subsection § 378A(b), which provides that unless otherwise specified in the governing instrument, assets funding the pecuniary marital bequest shall carry their value on the date of distribution. The addition of § 378A(b) codifies existing law. The legislature originally enacted § 378A to assure the satisfaction of the requirements of Rev. Proc. 64-19, 1964-1 C.B. 682, and the latest changes to § 378A carry forward that intent.

266. Act of April 29, 1991, 72nd Leg., R.S., ch. 97, §§ 1, 2, 1991 Tex. Sess. Law Serv. 664, 664 (Vernon). The Act amended TEX. PROB. CODE ANN. § 131(g) to provide that, except as provided in new subsection § 131(j), no temporary guardianship may last longer than sixty days, and adds TEX. PROB. CODE ANN. § 131(j), which allows a temporary guardianship to continue to the later of the date of the hearing on the contested or challenged matter or sixty days after creation of the temporary guardianship.

267. Act of May 25, 1991, 72nd Leg., R.S., ch. 561, 1991 Tex. Sess. Law Serv. 1979 (Vernon) (added new TEX. REV. CIV. STAT. ANN. art. 5996h and revised the state nepotism statutes. TEX. REV. CIV. STAT. ANN. art. 5996h (Vernon Supp. 1992) seems to amend every statute that contains reference to relationships by consanguinity or affinity.

268. TEX. PROB. CODE ANN. § 130E(b) (Vernon Supp. 1992) states the method of giving notice in limited guardianship proceedings.

F. Trusts

The legislature amended the sections of the Property Code²⁶⁹ that provide the standards for trust management and investment.²⁷⁰ Trust property subject to the standard of judgment and care of the trustee now includes any "investment vehicle authorized for the collective investment of trust funds pursuant to Part 9, Title 12, of the Code of Federal Regulations."²⁷¹ In order to determine whether the trustee has prudently made investment decisions concerning the trust property, one must now look to the overall investment strategy of the trustee rather than the prudence of a single trust investment.²⁷² Rather than listing specific types of investments that a trustee may acquire and maintain in a trust, such as bonds, debentures, stock, and other investments, section 113.056(b)²⁷³ now provides that a trustee may acquire every kind of investment that prudent persons would acquire for themselves.²⁷⁴ A trustor may now direct how trust assets shall not be distributed in the event the trust fails, terminates, or is revoked.²⁷⁵ Courts may now clearly reform noncharitable gifts and trusts to conform to the general intent of the trustor if the gift violates the rule against perpetuities.²⁷⁶ A trustee may now divide a single trust into two or more separate trusts without a judicial proceeding if the trustee determines that the division of the trust could result in significant savings in federal transfer taxes or any other taxes imposed on the trust property.²⁷⁷

269. TEX. PROP. CODE ANN. §§ 113.056(a), (b) (Vernon Supp. 1992).

270. Act of May 28, 1991, 72nd Leg., R.S., ch. 876, § 1, 1991 Tex. Sess. Law Serv. 2987, 2987-88 (Vernon).

271. *Id.*, amending TEX. PROP. CODE ANN. § 113.056(a).

272. Act of May 28, 1991, 72nd Leg., R.S., ch. 876, § 1, 1991 Tex. Sess. Law Serv. 2987, 2988 (Vernon) (amended TEX. PROP. CODE ANN. § 113.056(a)). If the trustee invests in only one investment vehicle, one must consider the overall performance of the investment vehicle, rather than the performance of a single investment within the investment vehicle, in order to determine whether the trustee prudently invested the trust assets.

273. TEX. PROP. CODE ANN. § 113.056(b) (Vernon Supp. 1992).

274. Act of May 28, 1991, 72nd Leg., R.S., ch. 876, § 1, 1991 Tex. Sess. Law Serv. 2987, 2988 (Vernon) (amended TEX. PROP. CODE ANN. § 113.056(b)).

275. Act of May 24, 1991, 72nd Leg., R.S., ch. 895, § 17, 1991 Tex. Sess. Law Serv. 3062, 3069 (Vernon) (amended TEX. PROP. CODE ANN. § 112.053). This provision is consistent with the changes to TEX. PROB. CODE ANN. §§ 3(f) and 58. *See supra* note 230 and accompanying text.

276. Act of May 24, 1991, 72nd Leg., R.S., ch. 895, § 16, 1991 Tex. Sess. Law Serv. 3062, 3069 (Vernon) amends TEX. PROP. CODE ANN. § 5.043(a) and (b) to state unequivocally that the cy pres doctrine will apply to noncharitable gifts and trusts. Some recent Texas cases have held that prior to this revision § 5.043 applied only to charitable gifts and trusts. *See Foshee v. Republic Nat'l Bank*, 617 S.W.2d 675, 678-79 (Tex. 1981); *Ball v. Knox*, 768 S.W.2d 829, 832-33 (Tex. App.—Houston [14th Dist.] 1989, no writ). Charitable gifts, however, are not subject to the rule against perpetuities.

277. Act of May 24, 1991, 72nd Leg., R.S., ch. 895, § 18, 1991 Tex. Sess. Law Serv. 3062, 3069 (Vernon) (added TEX. PROP. CODE ANN. § 112.057 to allow the trustee to divide the trust without judicial proceedings). The new trusts created by the division must have identical terms with the exception of the tax elections that may be made for the new trusts. TEX. PROP. CODE ANN. § 112.057(a) (Vernon Supp. 1992). TEX. PROP. CODE ANN. §§ 112.057(a)(1) and 112.057(a)(2) (Vernon Supp. 1992) provide for the method of dividing the trust and § 112.057(b) (Vernon Supp. 1992) provides for the method of allocating trust assets among the new trusts. Additionally, a trustee may merge two or more trusts into one trust without a judicial proceeding if he is not prevented from doing so by the terms of the trust instruments

and if the merger would result in significant decreases in federal transfer taxes or any other taxes imposed on the trust property. TEX. PROP. CODE ANN. § 112.057(c) (Vernon Supp. 1992). A trustee may divide or merge a testamentary trust after the will has been admitted to probate prior to receiving trust assets and may divide or merge an irrevocable inter vivos trust prior to receiving trust assets. *Id.* § 112.057(d).

